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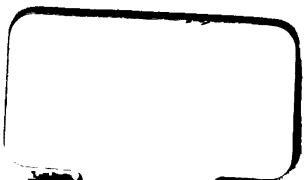

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The Land Laws

THE ENGLISH CITIZEN:

HIS RIGHTS AND RESPONSIBILITIES.

THE LAND LAWS

BY

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FREDERICVS . POLLOCK

PREFACE.

SOME words of introduction seem desirable in order to explain what this book aims at, and what it does not. The subject is the Land Laws of England, not those of Scotland or of Ireland, which, for different reasons, were beyond my plan. Scotland has a distinct legal system of her own with a distinct history; the study of it, a highly interesting one so far as with my slight knowledge of it I can judge, would be a separate undertaking. Irish land law, on the other hand, is nothing but imported English law with certain modifications. The only material modifications are those lately made in the relations of landlord and tenant, and they are too much involved with political controversies, and with still unsettled questions peculiar to Ireland, to be profitably treated in connection with English institutions.

Dealing, then, with England alone, I have endeavoured to make the principles and the leading features of our law of real property intelligible to a reader who is without legal training, but is willing to take some little pains to understand. I say the principles and the leading features, not the application in detail; it would be worse than idle to hold out any pretence of making

every man his own lawyer in such matters. There are already quite enough popular books of that kind for such as will put their trust in them. I have adopted in the main the historical plan of exposition, rather because the nature of the subject-matter forced it on me than from any general prepossession. My task has been to speak at the same time exactly enough for lawyers and plainly enough for laymen; a task of which the difficulty can be estimated only by those who have made the trial. I have endeavoured not to introduce technical terms without explanation, and to make every explanation accurate as far as it goes. Having, moreover, to do this in a small compass, it cannot be that I have not sometimes erred; happily those who are most able to detect errors will also be the most ready to forgive them. In touching on controverted points of policy, I have tried to state facts clearly and fairly, but have not attempted to disguise my own opinions. In such a case the affectation of impartiality can ensure only the certainty of tediousness.

Various topics of government and public economy, more or less connected with land tenure, may be said to lie on the border of the main subject, and question may be made whether they would be properly included, and which of them, if any, should be preferred to the others. But no doubtful choice among such topics has offered itself in the present undertaking, for the simple reason that there was no room to treat of any of them. Local Taxation, Succession Duties, and the Game Laws, are examples of the kind. It seemed better to give a tolerably full view of a few things not generally accessible than to slur them over for the sake of adding a

hasty summary of other things already familiar in public affairs, and assignable with at least equal justice to other departments.

In a work of this scale it is impossible to make such acknowledgments as otherwise would be due. Scholars will be able to follow and test my authorities without much trouble; for their use (and without displeasure, I trust, to the less curious reader) I have given specific indications where I thought it convenient. And yet I have debts which I must not omit to mention. Mr. Elton has laid me under obligation by private communications as well as by his published writings. My friends Mr. H. W. Elphinstone, Mr. G. H. Blakesley, and Mr. F. W. Maitland, have at all times given me the fullest benefit of their learning and criticism—a generosity in things of the mind, comparable to that of the apostolic community in things of worldly substance, which has ever been the tradition of our common profession. Among books which handle the matter on the economic rather than the legal side, that which I have found most useful and trustworthy is the Warden of Merton's *English Land and English Landlords.*

An Appendix is added for the discussion of certain special points. The Notes marked A, B, C, and D are intended for historical students as well as for lawyers. Notes E and F are addressed to lawyers only.

The Index is made, by a simple typographical device, to serve to some extent the purpose of a Glossary.

LINCOLN'S INN,
October 1883.

CONTENTS.

CHAPTER I.

PAGE

INTRODUCTORY 1

CHAPTER II.

THE OLD ENGLISH CUSTOMARY LAWS . . 19

CHAPTER III.

THE MEDIÆVAL SYSTEM 51

CHAPTER IV.

LEGISLATION AND TRANSFORMATION . . 76

CHAPTER V.

DEVELOPMENT OF MODERN LAW 105

CHAPTER VI.

PAGE

LANDLORD AND TENANT 133

CHAPTER VII.

MODERN REFORMS AND PROSPECTS . . 157

APPENDIX.

NOTE A. THE GERMANIC LAND SYSTEM . . 186

NOTE B. THE CLASSIFICATION OF ANGLO-SAXON ESTATES IN LAND . . . 189

NOTE C. VILLENAGE, VILLEIN TENURE, AND COPYHOLDS 195

NOTE D. PRIMOGENITURE IN SOCAGE LANDS . . 205

NOTE E. "CESTUI QUE USE" AT COMMON LAW . 208

NOTE F. SETTLEMENTS AND PERPETUITY . . 209

THE LAND LAWS.

CHAPTER I.

INTRODUCTORY.

THE laws and usages which govern the tenure of land in England are, as a whole, unique. Our land system is commonly called feudal, sometimes by persons who use the word as a disparaging epithet without any clear notion of what it means. This is not in itself wrong, but it conveys a most imperfect notion of the number and variety of the influences that have made our land laws what they are. The statement and the belief implied in it are so inadequate as to be misleading. Almost every possible kind of ownership, and almost every possible relation of owners and occupiers of land to the State and to one another, have at one time or another existed in England, and left a more or less conspicuous mark in the composite structure of the English law of real property. We have to follow out a long story before we can understand how much and how little feudalism abides in the present state of things. There are still in force many local customs and rights which are now known to date—in their nature in all cases, and in their actual origin in many—from a time when the

feudal system was unheard of, and indeed when private property in land, as we now understand it, was a struggling novelty. The main body of the technical expressions of the law, and of the technical habit of thought which they preserve, is derived from feudalism; but this feudalism has been deeply modified by circumstances peculiar to England. In Scotland the feudal system grew to its full development with little interference, if any, from legislation; and the forms of Scottish land law still preserve the system in great comparative purity. Here legislation has constantly interfered, and its effects have been to produce radical changes. These changes have not always been such as the Legislature intended; in one or two material instances the effect has been the very opposite of that which was aimed at. One celebrated measure of Henry VIII.'s reign, the Statute of Uses, was passed in order to restore the ancient simplicity and notoriety of titles to land, though more in the interest of the Crown and other great lords than in that of the public. The object of the statute was almost at once defeated by judicial construction. But it did not remain inoperative; it had other and quite unexpected results. The first was to make the transfer of land, without any act or ceremony for securing publicity, far easier than it had ever been before. The second, worked out in the days of the Commonwealth and the Restoration by the ingenuity of two or three lawyers, was to introduce the method of strict settlement of landed property which is practised by a great proportion of landowners to this day. Thus, as we shall see more fully hereafter, a measure intended to compel notoriety and simplicity

became the chief instrument of secrecy and complication. Turning, on the other hand, from the titles and tenures of owners to the relation between owners and occupiers, we find this resting to a great extent on something thoroughly opposed to feudal ideas—namely, the modern economical conception of land as an article of commerce which, like any other commodity, is bought, sold, and hired for prices regulated by competition. In the case of town dwelling-houses, and buildings used for trade or manufacture, this view is carried out to its full extent, and the relation between landlord and tenant is a purely commercial one. As to farm-holdings, it is still otherwise in many cases, though I suppose by no means in all, owing to the survival of usages and habits which we may in a loose way call feudal if we please.

Thus our system of landed property is a structure of the most complex and heterogeneous kind. So great is the technical complication and difficulty of our laws on the subject that within the special studies of the legal profession the study of them is a speciality of itself. Even among accomplished lawyers the number of those who are well versed in real property law is but small; the number of those who know the history of the law is a smaller one still. A generation ago learned persons might be found, such as the late Lord St. Leonards, who seriously maintained that this complication was inevitable, and was indeed only a mark of perfection in the machinery. Few persons, if any, can be found to maintain it now. But this very complication which calls for amendment is one of the chief obstacles in the way of amendment being made. The whole subject is such a mystery to laymen that, though they may know something is amiss,

they cannot tell where the remedy should begin, and do not know what to ask for. Among lawyers a considerable number are hostile to change, and a greater number indifferent. Those who make the shoe do not feel it pinch, and those who feel it pinch do not know how shoes are made. It has often been said that in no country are landowners so ignorant of their legal position or so dependent on legal advice as in England; and I believe it cannot be contradicted. It would seem, therefore, worth a serious effort to overcome or break down in some fashion the barrier between the minds of lawyers and laymen which is apt to make discussion between them a game of cross purposes. How this can best be brought about is a knotty question. Statements made in the proper technical terms are in danger of not being understood, or, what is worse, being misunderstood; while for those who are once accustomed to the use of such terms it is far from easy to state the same facts, even in the most general outlines, in language to be understood by all men, and yet accurate as far as it goes. One common method of popular exposition, not only in law but in other special sciences, is to give loose or insufficient explanations of the terms of art, and then use the terms as if the reader had been enabled really to understand them. This is the most dangerous way of all, being by so much worse than those which lead to mere bewilderment as false knowledge is worse than ignorance. Instruction of this kind is answerable, presumably, for the loose talk about primogeniture and entail which still abounds in the mouths of people who might easily know better. Serious and capable writers, Mr. George Brodrick and some others, have done some-

thing to provide a remedy. But the discussion of economical questions has left them, as a rule, hardly room enough to show clearly and plainly the legal composition of our land system. Now the whole structure, as we have just said, and as Mr. Brodrick points out in a notable passage of his book, is a result of many successive accretions, and those not of a natural but of a casual sort. It has not been produced by deliberate legislation, nor yet by the spontaneous growth of custom. Hence it cannot be understood by itself. It has no intrinsic coherence, and no organic principles. It is a series of historical accidents, and becomes intelligible only in the light of its historical conditions. And this is not less the case, but rather the more so, when the persons desiring to understand it are viewing it from the outside and are unfamiliar with its details. Our aim therefore will be, so far as our skill reaches and the thing can be done on so small a scale, to disentangle the several historical elements that go to make up our modern English real property law.

Let us imagine ourselves placed on some commanding point within the boundaries of a great English estate, looking over its mansion-house and its park, its fields and pastures, its woods and wastes. Over against us there rises an open hill, covered, it may be, with brilliant gorse and heather in their season, and fringed and crested with wild woods. These are open and common lands, over which many persons have rights of putting so many beasts to graze, of cutting turf and underwood for the use of their habitations, and the like, according to the custom of the country and place. Such rights were explained by our law-books, until quite recently,

so as to make them fit into a complete feudal theory of land-holding. They were supposed to have been granted by the lord of the manor to his tenants, or to have grown up within his domain by way of sufferance and usage, till the long-continued approval of successive lords passed from a matter of favour into a matter of right. This, or something like it, may sometimes have happened. But in general the true history is just the other way. The people who exercise rights of common exercise them by a title which, if we could only trace it all the way back, is far more ancient than the lord's. Their rights are those which belonged to the members of the village community long before manors and lords of the manor were heard of. Perhaps there are also parcels of Lammas land in the neighbourhood—fields which are enclosed and cultivated part of the year, and during the other part thrown open for the common use of the several occupiers, or (as is more likely to be the case) of a larger class of persons. Such arrangements are relics of the time when separate ownership of land was in its infancy. These and other ancient communal rights are often vested in the inhabitants of the parish, which may well be thought to represent a still older community, and to preserve in such lingering usages some traces of its original constitution. Examples of them have been much diminished in the last few generations by the steady progress of enclosures, but they are still not uncommon. Between our imagined post and the waste land there lies a stretch of cultivated ground, occupied by one or more farmers. They may hold under leases for a considerable term of years, or only from year to year, but in the latter case they may, under favourable circumstances, enjoy a good

deal of practical security in their tenure. In any case their legal condition is of a relatively modern and simple kind. It was barely provided for in the economy of the feudal system, and is exempt from the mysteries of the law of real property. A leaseholder's interest in his farm is dealt with, in case of his death without disposing of it by will, in exactly the same way as his interest in the stock on the farm, or money in the funds, or any other movable property. In the language of the law it is *personal*, and not *real* estate. The complexities of which we have spoken affect him only through his landlord, in so far as they tie the landlord's hands in dealing with the tenant and improving the property. Nearer to us, again, at the foot of the park, is a little home-farm, kept in hand and managed by an agent on the lord's immediate behalf. This method of cultivation was the prevailing one for a considerable part of the Middle Ages. We now meet with it only as an exception; sometimes it is a luxury, sometimes an experiment, sometimes the necessity of a bad season.

Now let us turn to the park and the manor-house itself, which may fill the foreground of our imaginary landscape. The lord of all this is himself a tenant, though not in the popular sense, or to much practical effect. His lands are held of the Crown, or perhaps of some other superior who himself holds of the Crown. His predecessors before the Commonwealth time owed rent or services, or both, and were subject to a variety of occasional dues and payments, some of them of a vexatious kind. They were bound to follow the king or other over-lord when he went forth to war, and bring with them a specified armed force, or pay for the

maintenance of its equivalent. The feudal dues and services have been abolished; but ancient money rents, technically known by various names, and reduced to a nominal amount by the changes that have taken place in the standard of the coinage and the value of the precious metals, often survive to this day. Some ancient rents are not in money but in kind. The city of London still pays to the Crown certain horse-shoes and nails as the rent of a piece of land in the parish of St. Clement Danes, once granted by the king to a farrier, and a faggot as the rent of some waste lands in Shropshire.[1] In some cases the Crown is entitled to receive some weapon of war, or part of warlike equipment—a sword, a banner, a pair of gloves, or spurs. Once or twice these ancient tenures, which were esteemed peculiarly honourable, have been imitated in modern times on the occasion of public grants for distinguished military services. But if the remnant of feudal relations to a superior is at this day no burden to the English landowner, and at most adds a picturesque circumstance to his title, he is apt to be restrained in other ways of more modern and subtle invention. The lord of this mansion is named by all men its owner; it is said to belong to him: the park, the demesne, the farms, are called his. But we shall be almost safe in assuming that he is not the full and free owner of any part of it. He is a "limited owner," having an interest only for his own life. He might have become the full owner, though still under a greater or less burden of incumbrances created by his predecessors,

[1] These rents are now received by the Queen's Remembrancer a few days before the beginning of Michaelmas term. The payment has long since become merely ceremonial, the same horse-shoes and nails doing duty on each occasion.

if he had possessed the means of waiting, the independence of thought and will to break with the tradition of his order and the bias of his education, and the energy to persevere in his dissent against the counsels and feelings of his family. But he has had every inducement to let things go their accustomed way. Those whom he had always trusted told him, and probably with sincere belief, that the accustomed way was the best for the family, for the land, for the tenants, and for the country. And there could be no doubt that it was at the time the most agreeable to himself. As soon, or almost as soon, as he was of age to bind himself, he entered into a new settlement, by which his own interest was reduced, like his father's before him, to that of a life-tenant, and the succession of his offspring secured in advance down to the farthest limits allowed by the law. The legal machinery by which this is done is little more than two centuries old, and, though refined and improved in details by the ingenuity of generations of conveyancers, has not been much altered in substance since its first invention. It owes nothing to legislation, except by accident. Thus, then, the apparent owner of the domain is no more absolute as to its actual disposition and management than the king is absolute in a limited monarchy. He can do but little of his own motion, and what he does is for the benefit of successors not of his own choice. Likely enough, he has no clear notion of his own powers and their limits. An English family settlement is on the whole less intelligible, and certainly less understood by most English citizens, than the English Constitution. In practice the limited owner has to put himself a good deal in the hands of experts, and oftentimes he is fain to make

the family solicitor his prime minister. The advice he gets is pretty sure to be on the safe side—that is, on the side of not trying experiments. A family solicitor, unlike those who administer affairs of State, has no motive whatever for being enterprising in his client's affairs, and many to the contrary. He cannot hurt himself by over-caution, and may hurt himself much by rashness. So he takes, as a rule, the line of doing as little as possible, which is one much commended in all walks of life to those whose first object is their own peace and quietness.

Peradventure the lord of this estate is lord in a strict legal sense—that is, as lord of a manor. We have, indeed, assumed as much in our description. In this capacity he is a kind of small sovereign prince, possessed of his own courts, and doing justice according to his own procedure and customs. But his powers and jurisdiction are shrivelled by the changes and chances of centuries into next to nothingness, and only the names of them remain. In the voluminous settlement which confers title to these lands on him and his issue, the manorial franchises are enumerated in a roll of strange-looking terms, many of which are now obscure even to the lawyer, unless he is also a historical student; there are English words among them of immemorial antiquity, which had their technical meaning centuries before the Conquest, and which the Norman lawyers, only half understanding them, thought it prudent to leave untranslated. They held their own through the invasion of Norman-French and Latin, and their native English hardly knows them again when it meets them. As for the lord himself, he knows neither the words nor their meaning unless he happens to be a scholar and an anti-

quarian. Nor is he concerned to know them for any purpose of business. The ancient franchises and profits are obsolete, and have been so for many generations. The manorial courts exist in form, and their records are kept in the ancient fashion. But the fine by which a thief caught within the boundaries redeemed his life is no longer a source of revenue to the manor, neither does the lordship of "view of frankpledge and all that to view of frankpledge doth belong" convey any sensible increase to the wealth or the dignity of the modern landowner. To be lord of a manor is to be the lord of a secular ruin, in which he that knows the secret of the crabbed spell-book may call up the ghosts of a vanished order of the world.

Thus we have taken a hasty view of the legal aspects of an English landed estate, which will presently come before us one by one for a more detailed survey. It is an unparalleled accumulation of layer upon layer of diverse materials. Tenure and convention, custom and competition, legislation and usage, the rude common life of the free Teutonic warrior tribes, an aristocratic military system sprung from sheer necessities of mutual defence, and disguised in the terms and reasons of a Romanized law, the subtle deductions of a legal profession trained in scholastic disputes, the attempts of an impatient Parliament to make their crooked things straight, the not less subtle and more flexible inventions of modern lawyers, the partial clearances and half-hearted amendments of modern law-reformers: all these have gone to the making of the vast and inextricable mass, and all must be considered in their turn by the seeker who is bold enough to search out the history and the meaning of the land laws of England.

It may be not amiss, meanwhile, to point out one or two of the general features in which the legal conceptions of ownership and rights over land are at variance with the popular ones. It is commonly supposed that land belongs to its owner in the same sense as money or a watch. This has not been the theory of English law since the Norman Conquest, nor has it been so, in its full significance, at any time. No absolute ownership of land is recognized by our law-books except in the Crown. All lands are supposed to be held, immediately or mediately, of the Crown, though no rent or services may be payable, and no grant from the Crown on record. The feudal lawyers forestalled to some extent in substance, and to a large extent in form, the modern Socialist dream of the State as the universal landlord. It was much more thoroughly forestalled, as we shall shortly see, by the Germanic customs of unknown antiquity which our remoter forefathers brought with them into Britain. On the other hand, the law is equally far from countenancing the belief that there is land which belongs to nobody and is free to all the world. Some such belief is probably held by most people who are not lawyers. Appearances are certainly in its favour, and indeed the thing was legally possible in the Roman system, and I suppose is still legally possible in many Continental countries. But in England it is not legally possible. Land may be subject to public rights of way, to rights of common, and to a great variety of private rights. It may be worthless for all purposes except those of recreation, and the owner may be undiscoverable. But an owner there must be somewhere; the Crown in the last resort if no other is forthcoming. I

am not aware that the public at large have a strict right to be anywhere except on highways (including estuaries and navigable rivers) and public paths, in places expressly dedicated to public use and enjoyment by their former owners or by Act of Parliament, and on the foreshore of the sea between high and low water mark. And strictly speaking the right to be even on a highway is limited to the purpose of passing and repassing. As the late Master of Trinity College, Cambridge, said of the College bridge over the Cam, it is a place of transit and not of lounge. In like manner the right to be on the foreshore is of doubtful extent. It is said to be limited to purposes connected with navigation and fishery, though this opinion was given not without weighty protest, and would perhaps not be upheld now. There is a widely-spread popular notion that the public have the right of going not merely along the foreshore, but along the edge of the cliff, where by reason of the steepness of the coast there is no foreshore; in short, that it is of common right to make one's way along the coast somehow, by the foreshore where there is any, but if not, then otherwise. So far as I can discover, there is no legal authority whatever for this belief. We may take the legal contrast between Wimbledon Common and Dartmoor as another pretty striking illustration. To ordinary observation they both have the air of waste places belonging to nobody, and Dartmoor, I need hardly say, is much the waster and wilder of the two. A shrewd observer might guess from the situation of Wimbledon Common that it would hardly remain open at this day if something had not been done to preserve it. But certainly no one but a lawyer would guess that the

public have a better right to be on Wimbledon Common than on Dartmoor. Yet such is the case. Wimbledon Common has been dedicated to the public by an Act of Parliament. Dartmoor is, in practice, quite as free for all the world to walk and ride on, but the number of persons who have any strict right to be there is probably by no means a large one. Most of the moor belongs to the Duchy of Cornwall, which, on the whole, is better for the public than if it belonged to private owners. The only legal obstacle to Dartmoor being enclosed is the existence of rights of pasture and turf-cutting over it, which, of course, belong not to the public but to a definite though considerable number of commoners. Probably it might be found in the case of Dartmoor, as in the case of Epping, that the old forest laws afford means which may at this day be used with effect against encroachments, but still the public at large would have no enforceable right. The same is the case with any other common which is not preserved by statute. Practically the unenclosed and untilled ground of England is free to the public for two reasons. The owners have no interest in keeping the public off, and would find it both an invidious and a troublesome thing if they tried. Against a trespasser not in pursuit of game the only remedy is a civil action, and no jury would give substantial damages, nor any judge give costs, against a trespasser on a wild moor or down who had neither molested the owner, disputed his title, nor injured his property. No one is likely to spend his money for the sake of having a farthing damages, being told by the judge that it serves him right, and making himself odious and ridiculous. As a rule we hear of actions for trespass

only when there is a claim of right to be settled. This is an example of a principle that runs through the whole administration of law, and in English law is very conspicuous. It is impossible so to limit the rights of owners that they cannot sometimes be harshly and vexatiously used. But it is possible to have things so ordered that the extreme use of a man's legal rights which would be intolerable to his neighbours shall also give to himself so much trouble as will deter most men from attempting it. This is accomplished in England partly by an active public opinion, partly by the wide discretion entrusted to judges and juries. For many things of great importance, including all the modern developments of the British Constitution, we are content to rely on understandings rather than positive law. The day may come when express law has to take the place of these informal understandings. It has come in the business of Parliament, and, while these pages are passing through the press, it comes in the relations between landlords and farmers. It is useless to deprecate changes of this kind in the face of need; but there will always be a sort of people, often the best sort, who regret the old easy-going ways.

It may seem strange that in England, the land where above all others the personal and political rights of the simplest freeman have been saved whole through all changes of princes and dynasties, the law should find so little room for public and unstinted rights of using the very elements. Even the air is not free, for the maxim is that the owner of the soil is owner up to the height above and down to the depth beneath. I conceive it is indisputable that to pass over land in a balloon, at what-

ever height, without the owner's or occupier's licence, is technically a trespass. This doctrine does not, for the reasons I have mentioned, lead to any grave inconvenience. If it did, its historical explanation would not throw much light on the question of what should be done with it, much less justify its continuance. But the explanation is not far to seek, and it is fitting that we should put ourselves in a position, so far as we can, to judge ancient institutions and maxims with all fairness, not only as to their present convenience for us, but as to their origin and history, and the reasons of their acceptance in the past. In this case history tells us that the conception of rights common to all the public is a modern one. Even the personal freedom of the old days was the right of a privileged class, for below the freeman there were unfree men, serfs bound to the soil and slaves, the conquered foes of past generations and the captives of his own. The Roman citizenship, which had grown step by step from the exclusive franchise of a conquering tribe to the common right of every freeman in the empire, had its community rudely broken up by the Teutonic invasions. Far into the Middle Ages law was for many purposes not general, or territorial, but personal. Besides the radical distinction between free and unfree men, the freeman of the Carolingian empire might be a Frank, or a Lombard, or a Roman provincial, and in every case he would be governed by a different law. So in British India to this day there are widely different laws of marriage and inheritance for the Hindu, the Mussulman, and the Parsee, and sensibly different laws, though not so different, for the Hindus of Bengal and the Hindus of Madras. In Europe this kind of

difference could not persist. The victory of the Christian Church, and the revival of the Roman ideal of uniformity which had first moulded her institutions and then found a last refuge in them, destroyed all personal distinctions founded on religion by making the Church include the State.[1] Distinctions founded on race went the same way ere long. The Norman and the Englishman, and at a later day the Englishman and the Welshman, became one people. But a man's rights were still for the most part his rights, not simply as an Englishman, but as a member of some particular class and community. He lived under customs and enjoyed franchises which might be peculiar to his native hundred or even his native parish. In the Middle Ages there were few holders of land, by however humble a tenure, who had not some kind of rights of common annexed to their holdings. And every village and township would no doubt be as anxious to exclude strangers from its woods and pastures as to preserve its ordinary members' rights in them against encroachment from within or from above. We know, indeed, that the boundaries of the ancient German communities were guarded by a kind of sacred horror, and the most frightful penalties denounced upon violators of the *mark*. The mediæval Englishman's rights of common provided for his wants both of use and

[1] As late as Coke's time it was the theory of English lawyers that an infidel or pagan could have no civil rights. Jews certainly had none before their expulsion by Edward I. Regulations were made for their government, and they were ultimately banished from the realm, by the sole authority of the Crown; and they are expressly called the King's serfs in contemporary documents. In mediæval theory no one not a Christian could be a real member of the State, and Christianity was one and indivisible.

of recreation. People did not then travel for their pleasure, or make recreation a study. The legal theory which denied the possibility of public rights over land was only the formal expression of the dispositions and habits of society. These being what they were, the usage by which popular rights are acquired could not and did not grow up except within limited particular regions, for particular purposes, and in the acts of small local communities.

CHAPTER II.

THE OLD ENGLISH CUSTOMARY LAWS.

It has been said that the most hopeful way to understand the present structure of our land laws may be to pick out separately the various elements which are now mingled in the mass. Let us begin with that which is the oldest, the most popular, and still in some respects the most persistent—I mean the customary Germanic law which our ancestors brought with them from the mainland on their first settlement in this country, and developed after their own fashion, with little foreign interference or influence for good or for ill, until the reign of Edward the Confessor. Whatever else may be said of the early English land system, as preserved to us in Anglo-Saxon records and interpreted by modern scholars, it certainly had not the merit of simplicity. The modern law, though far from simple, is definite, and in the main uniform. Copyhold lands are subject to peculiar incidents and modes of alienation, and certain ancient varieties of tenure survive as local customs of inheritance. But with these exceptions, the substance of the law is the same for every piece of land in England. Before the Conquest there was no more one and the same law for every parcel of land than there was one

and the same law for every man. Land, like men, was impressed with different legal qualities and conditions, though its condition was not unchangeable. Separate property in land was well known; full and free private ownership, as we now understand it, was an innovation, and for a long time exceptional, though its constant tendency was to encroach on the earlier forms of tenure.

There were no less than four distinct species of landed property. First and apart from all the rest there was the *folk-land*, the land which belonged to no person or particular community, but to the nation. It answers exactly, in name and in kind, to the *ager publicus* of the Romans, and is supposed to have consisted originally of the land which remained over after sufficient allotments had been made to all the freemen of the invading host on the first settlement of the tribe. The folk-lands of the several kingdoms and principalities founded by the Teutonic invaders became the folk-land of the English when England was brought under one rule. Portions of the folk-land might be, and frequently were, turned into private property by grant from the sovereign power; or, without altering the ultimate public property in the land, the possession and enjoyment of it might be, and constantly were, let out to individuals. In the shires exposed to invasion this was the means both of rewarding past services in war, and securing the aid of the holders for the defence of the country in the future. Then there was the *common land* held as separate property, not by single owners, but by communities, something like the lands of colleges and other corporations at the present day, and as land is still held by

village communities in India and the eastern Slavonic countries of Europe. The enjoyment of these common lands was like that of the folk-land on a smaller scale: that is, the property remained in the corporate society, as we may call it in modern language, while the use was allotted by the common authority of the society among its members. But from a very early time considerable parts of these allotments became permanent, and assumed the nature of private property. When Tacitus described the institutions of the Germans of his time (and all modern research has only gone to confirm his account, which was once treated as a romance), each man's homestead was already his own, or perhaps we should rather say each family's. The land thus marked off from the common stock appears to have been described as *yrfe-land* or *erf-land*, heir-land (in modern High German, *erbland*)—that is, land passing by descent. In old times it could not be disposed of by the holder, but a custom gradually arose of alienating it by will, and perhaps by purchase, within the limits of the family. Freedom of alienation became greater as the bonds of the village community or township and of the family were loosened. The order of the steps would be of this kind: First, no alienation, but only inheritance; then alienation within the family, but with the consent of the possible heirs as well as the community; lastly the consent of the community would become a mere form. Where a lord of the manor had acquired the powers of the community, he probably acquired among them the veto on alienation which in historical times he certainly possessed. In this later shape also the restriction became a formality, but not an empty one. The lord's consent

could not be refused if the accustomed dues and fines were paid, but the dues and fines remained as a source of profit. The holder of heir-land, in his relation to the community, must have gone through nearly the same phases as the copyholder in relation to the lord of the manor, except that there never was a time when he was not secure in his holding; and this exception may turn out less important than it seems when we come to consider the origin and early history of copyholds. Probably the power of alienation differed in different parts of the country according to local custom. We do not know exactly how things stood when the old English forms of free ownership were swallowed up by the feudal doctrine of tenure. It does not appear, however, that the consent of the family ever became needless or merely formal, or that alienation to strangers was allowed. Lastly, there was *bócland*, or book-land, the land held in several property under the express terms of a written instrument, or book as it was then called. Such grants could be made in the first instance only by the king with the consent of his Witan. This tenure was of comparatively late introduction, and came in under the influence of the Church, and in favour of grants to religious houses.

Here we have at last something that comes up to full ownership, as we now understand it; but it is worth noting that when it does occur, it is not really of home growth. It is taken over from ecclesiastical, in other words from Roman habits of mind. There were no limits to the power of disposal enjoyed by the owner of book-land, save those which might be laid upon him by the terms of the grant itself. He

could without any further leave or consent grant it in his lifetime, as he had received it, by *book*, or dispose of it by his will. Book-land, with its full separate ownership, being an innovation, though an early one, it is clear that all book-land must have been created out of folk-land, common land, or heir-land. As to common land, there is no reason to think that communities as such had any power of alienating their lands, either by book or otherwise, or ever attempted to do so. Moreover, one object of a grant of book-land was commonly the spiritual benefit of the grantor, to be derived from the prayers of the religious house which took an immediate or ultimate interest. And this motive could not well exist in the case of a community. Still less, one would think, had the king any right to deal with the common lands of particular communities. Nevertheless, we find a certain number of charters granting rights over common land, and sometimes apparently portions of the common land itself.[1] It is tempting to suppose that the land, wood, or meadow described as *common* in both Latin and English is really nothing else than parcel of the folk-land. But this seems untenable, because in that case the expression would be much more frequent, and for other reasons. Perhaps we may suppose that in these cases the grantees already held the land as an allotment of either folk-land or common land. They may well have had by custom some sort of right to a renewal of the allotment to themselves or their descendants. If this were so, the effect of the grant would be to confirm the customary title in perpetuity, and to release the land from most of the public dues and services to which land

[1] References in Nasse, *Mittelalt. Feldgemeinschaft*, pp. 17-22.

other than book-land was subject. The release of these burdens would require a regular grant from the king, with the consent of the Witan, just as much as the severance of a new portion from the folk-land. This, however, is given only as a conjecture. We know very little about the way in which common land was actually dealt with before the Conquest, and its relation to folk-land is particularly obscure. Next as to heir-land, we cannot say with our present means of knowledge that it was never turned into book-land; but it could not have been lawfully done without the consent of every one who could possibly inherit. Such dealings were from time to time attempted and objected to. There is not any evidence that they were ever openly undertaken, or could take effect by any recognised means. Of encroachments and irregular dealings we do not speak for the present. Only folk-land, then, remains; and thus it appears that the ultimate legal origin of book-land must, as a rule, have been a grant made out of the folk-land. Ample records of such grants are preserved, and are, in fact, our chief means of knowledge as to the relation of book-land to folk-land. The grant could be effectually made, as above said, only by the king with the consent of the Witan, and also of his superior king, if he acknowledged any (for our records begin in a time when there were still many kings and under-kings of many tribes and kindreds of the English). Not only this consent was required for grants in perpetuity to private persons, but if the king wished to appropriate any part of the folk-land as his own heritage, a grant to himself had to be made out with the express sanction of his counsellors, in just the same form as if it had

been to any other person.[1] The notion that all public property was the king's, and that the king on the other hand could not hold property like a private person, came in after the Conquest. Yet we find somewhat earlier that when a man is forjudged of life and lands for cowardice in battle, as the lands held by him of a private lord go to that lord, so any book-land he may have does not become folk-land again, but is forfeit to the king.[2] In practice, however, it is hardly doubtful that from a very early time much of the increase of book-land at the expense of folk-land took place in irregular ways. It may often have been under colour of an occupation which was rightful in its origin, but as often, perhaps, by mere encroachment. The king and other great men had certain rights over the waste folk-land, and rights of use tended then, as much as they do now, to grow into claims of property in the hands of the strongest. It fared with the folk-land of the kingdom very much as it fared some centuries later, for similar reasons, with the common lands of the village or township which had become a manor. As early as the eighth century grants were made recklessly out of folk-land in the north of England to persons who professed the religious character merely to have the grant without the burden of the ordinary secular dues and services.[3] Whether book-land also increased at the expense of

[1] There is some reason for thinking that a grant of folk-land was regularly made to the king by the Witan on his accession, for the support of his dignity during his reign : *Cod. Dipl.*, 1312, Æthelred : "gratia dei me ad intelligibilem perducere dignata est ætatem, mihique per meorum optimatum decreta affluentem et copiosam terrarum largita est portionem."

[2] *Laws of Cnut*, ii. 77.

[3] Beda, Letter to Ecgbert.

heir-land is not so clear; though it seems likely enough that men of substance attempted to dispose of part of their heir-land as book-land, to pious uses or otherwise. It is certain that grants and wills of land described by the donors as book-land were not uncommonly disputed by their families, and that an ordinance of the Witan was thought needful to enforce even express prohibitions against alienation out of the family contained in the original "book."[1] The interests that were created in book-land by the original grants varied a good deal in their nature and duration. It is not known how far they were regulated by any fixed laws or usages. Sometimes a free and absolute power of disposal was conferred by the terms of the "book" on the person to whom the grant was made. Sometimes a special course of descent was prescribed, so that the disposition was analogous to a modern entail, or alienation was allowed only within the family.[2]

It is doubtful, however (as we see by the law of Alfred just cited), whether the will of the grantor was in such cases strictly observed in practice. A very common form was to grant an interest for one or more lives in succession, say to Oswine or Æthelwulf and to two heirs whomsoever he shall choose after his own time, with an ultimate gift to a religious house.

Such was in its main outlines the Old-English system of land tenure. But we must not suppose that all or most of the actual occupiers and tillers of the soil held

[1] *Laws of Alfred*, c. 41.

[2] Many examples of such limited gifts are collected in Kemble's Introduction to the *Codex Diplomaticus*. We may name as good specimens among charters No. 299, and among wills that of King Alfred, No. 314.

by any of these titles. If we did, we should fall into the same mistake as a foreigner who in our own time should imagine from reading modern English law-books that the whole or the greater part of the present occupiers are freeholders. There was indeed nothing, or next to nothing, resembling even distantly in form our modern leases for years and other inferior tenancies.[1] Nor was there, as there has been ever since the fourteenth century, any distinct class of labourers working on other people's land and paid by money wages. Nevertheless a great part of the cultivation of the land was undertaken by people who occupied it by the agreement or permission of the superior owner, and paid for its use in money, in kind, or in labour, not uncommonly in all three. Land thus held was known as *lén-land*, and the tenant was said to hold it (literally to sit on it) upon lén. The word, it is almost needless to add, is our modern *loan*. The lands of bishoprics and religious houses, in so far as they were not tilled by serfs belonging to the house and under its direct management, were dealt with in this manner; and we may well think that religious corporations had the chief hand in introducing lǽns, as they certainly had some centuries later with regard to leases of the modern type. The condition of the tenants of lén-land was various. The smallest of them were little better than cottiers; the largest may have been no worse than substantial farmers. Now and then they obtained a more permanent estate by grant from the owner, or as we should now say acquired the freehold. We have examples of a tenant of lén-land

[1] But one grant for a fixed term of years is found in the whole of the *Codex Diplomaticus*, and that is for three years only.

receiving a grant of his tenement by book, to hold it for book-land as fully as he did for lǽn-land; and it appears to have been a well-known practice for lords to make such grants to deserving tenants.[1]

This kind of tenancy was at first of minor importance. Towards the date of the Conquest, however, a great proportion of the actual occupiers must have held their lands on lǽn. In a certain sense it is even true to say that lǽn-land ultimately supplanted everything else, and that no other kind of landed property is recognised by the strict theory of modern English law. Historically, the growth of lǽn-land, and the changes thereupon consequent, are intimately connected with the personal relation of lord and man, of which, therefore, something must be said. It was familiar in England long before the Conquest, and constantly tended to assume greater importance in the constitution of society. At first it was confined to the small body of personal followers attached to the leaders of the Germanic tribes. At that time it was personal and nothing more, and there was no loss of rank or dignity on the follower's part. The chief's or king's companions must be free, and might be noble, and their service was an honour.[2] The modern European

[1] Kemble, *Saxons in England*, i. 312, 313. As he says in the same place, "where there was lǽn, there could properly be no book;" but the use of terms was in practice more or less confused; for example, *Cod. Dipl.* 1062, where a grant by charter, indistinguishable in its nature and incidents from the regular type of grants for lives so made by religious houses, purports to be by way of lǽn (Ealferð bisceop and da higan on Wintaceastre habbað geleǽneð [*sic*] hiora lcófan friónd viii. hída landes on Eastúne þriora manna deg, etc.) For closer discussion of this and some other points, see Note B in Appendix.

[2] Kemble's opinion that this relation involved the loss of

orders of nobility and knighthood owe to this aspect of the institution the greater part of their titles, their system, and their ceremonial; and European monarchies owe to it nearly all the pomp that surrounds them, and much of the sentiment on which their continuance depends. For many generations before the Norman Conquest, as distinctions of rank and substance between freemen increased, the old community of equals had been virtually replaced by a ruling class with a humbler and less wealthy multitude in dependence on them. For some time this state of things had become associated with the tenure of land to a considerable extent, and had thus prepared the way for the feudal and manorial system. Feudalism is the complete association of territorial with personal dependence. The tenant is not only an occupier who pays the owner in money or in kind for the use of the land; he owes him personal service and allegiance. The lord himself may be in like manner bound to an over-lord, and he again to another above him, until we come to some one who holds of no lord, and who, in the developed feudal theory, must be an absolutely sovereign prince. Old English land law never reached this stage, but it was tending towards it so fast that the Conquest may be said to have only hastened its transformation.

As far as the personal relation is concerned, we find it established in the earliest times of which we have any trustworthy account. Every man was expected either to be of substance enough to answer all payments he might become liable for, whether to private suitors as

freedom can only be called the eccentricity of a man of genius. It is disposed of by Konrad Maurer, *Kritische Ueberschau*, ii. 391 *sqq.*

damages or composition or to the public as fines, or to be dependent on a lord who could answer for him. Much as in English society of a far later time we find "masterless men" to be a name of thieves, vagrants, and peace-breakers, we find before the Conquest that no honest man can be without a lord unless he is a lord himself. In the first half of the tenth century this is fixed as a positive rule, and the lordless man must find a lord at his peril. If he or his kindred for him fail to do this, he becomes outlawed, and may be dealt with as a robber.[1] The men who had risen to the condition of being lords and protectors of the smaller freemen were naturally great or relatively great landowners. Their ancestors, we may suppose, had been distinguished by birth or exploits among their fellows, English or Danish, even before their settlement in this land. Enjoying at first a kind of undefined primacy among their equals, they gradually assumed a position of command. From the first, we may be pretty sure, their possessions were notably greater than those of common men, and gave them a corresponding influence on all public occasions. Each of them imitated the king to the best of his power by surrounding himself with a band of personal followers.[2] And the sorts of men likely to seek the personal service of a lord, or become dependent on him, were increased by several causes. The natural growth of population is one of these, for the land allotted in the first instance to the freemen of the conquering host would in a few

[1] *Laws of Æthelstan*, ii. 2.

[2] It is a minor question whether there was any distinct condition or qualification for a private man entertaining followers, or in other words setting up as a lord. The better opinion appears to be that there was not.

generations be a too scanty means of livelihood for their descendants. Men with no secured possessions of their own were driven to find a place in dependence on those who had land and goods to spare. Another large class of free dependents were those who had property, but were not strong enough to guard it in times of trouble. These commended themselves to a lord for protection, and with themselves their land. There were likewise the manumitted serfs, a class which became considerable in the tenth and eleventh centuries, manumission being encouraged by the Church and reckoned a pious work. Neither were the old motives wanting which in the time of Tacitus had led the young men of the German peoples to cast in their lot with kings and chiefs. Adventurers in search of warlike renown or booty, exiles driven from their home by civil strife, or flying the vengeance of a slain man's kindred, craftsmen skilled in the arts which supplied the luxuries and recreations of life, such as then they were; all these still contributed to swell the number of dependents, as they had once chiefly formed it. So far the connection with land tenure appears as accidental. The companion may or may not be a landholder; and if he is, the lord to whom he is personally attached may or may not be his superior in respect of the land. On the other hand we do not know, and have no right to assume, that the man who occupied another's land on lǽn was necessarily his personal dependent. In course of time, however, and by steps of which the beginning may lie farther back than the earliest of our documents, the dependent becomes a tenant, and at last dependency and tenancy become in legal theory co-extensive. According to the tenant's degree of personal rank, the inchoate

tenancy takes a different complexion. The personal aid and service rendered in war to the king and the earls by their more distinguished followers comes to be looked on as the equivalent of the benefits received by them. Even before the Conquest there are traces of duties and relations hardly distinguishable from the true military tenures of a later age. The free landowners owing military service to the nation are becoming tenants holding their lands by military service of the king.

Among the smaller folk things happened somewhat differently. Their hereditary holdings were subject to the order and regulation of the township out of whose common land the holdings had in the first instance been allotted. Probably the business of the township was for the most part swayed by a few leading members even when its constitution was nearest the primitive type. The passage from this aristocracy of natural selection to the petty monarchy wielded in after-times by the lord of the manor may have taken place in various ways, and most likely did, according to circumstances, take place in all of them. In some townships a chief house might become richer and more prosperous than the others, until its head possessed a commanding influence, and the poorer members were glad to become his dependents. But the man who had thriven and become a lord in his own township would be sought as a protector, sooner or later, by strangers also. There were times of warfare between kingdom and kingdom, and later of Danish harrying and general disorder, in which old bounds and usages were overridden, and the bonds of society loosened. There were times of distress, too, when freemen were ready to "bow their heads for meat" to any one who would support

them, insomuch that the neediest of them were driven to become not merely dependents but serfs. Thus the dominion of the stronger landholders, once set on foot, was increased by the submission of many sorts of people, now singly, now collectively. Whole townships, it is likely enough, resolved to seek a lord while they yet held together as organised communities. On the other hand, it is no less likely that the dependents of a great man, gathered together at first from all the country round, without any fellowship among them but that of a common subjection, formed communities modelled on the old free townships of which they or their fathers had been members. Grants of public jurisdiction and revenues from the king completed the strength and pre-eminence of the lords. The township was turned into a manor, and its hereditary freemen into the lord's tenants. The common land came to be looked on as the lord's land, and the old popular courts which dealt with local affairs as the lord's courts. He was no longer first among equals, but a ruler over inferiors. This process, repeated all over the country, had long before the Conquest made England into a land of great estates, cultivated partly by personally free dependents and partly by serfs. But it had not altogether supplanted the smaller free tenancies, and the old communal ownership and tillage was still widely prevalent, though the community might have over it a lord claiming dues and services.

We may now ask what became of these divisions of land tenure as they existed before the Conquest, and what traces they have left on the modern law. These traces will appear on examination to be far deeper and

more lasting than is commonly known. The inquiry, therefore, is something more than a piece of minute antiquarian curiosity.

First we may dispose of book-land. I have tried to show that its importance as a normal and constant element in the Old-English land system has hitherto been overrated. If this is right, we may the more easily understand the certain fact that we hear next to nothing of book-land after the Conquest. Many of the great estates, probably most, were confiscated on account of the owner's resistance to William. There must have been many cases, however, notably those of religious houses, where the substance and enjoyment of possession remained undisturbed. In these cases the form was none the less superseded by the new Anglo-Norman theory of tenure and the corresponding forms which it introduced. The Norman charter, which in strictness was only evidence of the corporal act of investiture, took the place of the English "book"; and where no real services were performed by the landholder, nominal ones were invented to save the credit of the theory. Religious persons were supposed to hold their lands on condition of performing divine services[1] which would assure the spiritual benefit of the grantor and his heirs, as the lay tenants held theirs by rendering to the lord the temporal and tangible benefits of military or agricultural aid. And the lands of ecclesiastical corporations are to this day said to be held by the tenure of *frank almoigne* or free alms, though the explanation which

[1] Services, that is, not specifically defined or demandable. In some cases the services were definite, and then the tenure was "by divine service" strictly so called, in opposition to *frank almoigne*.

originally supported the fiction of a tenure has disappeared since the Reformation.[1] Such lands now represent book-land, so far as anything can represent it in our modern system. There is no doubt that at least some of them are in fact ancient book-land which has been held without a break in title since it was first granted by some West-Saxon or Mercian king with the witness and consent of his Witan.[2] Of course no new book-land was created after the Conquest. Not only the forms of legal documents were changed, but the creation of book-land in the old sense and in the old fashion was impossible. It was created, as we have seen, out of folk-land. But there was now no folk-land to make it of.

This brings us to the second question. What became of the folk-land? The answer to this is both short and certain. It became the king's land. The king not only dealt with the land which had been the nation's without the counsel or consent of the Witan or any one else, but treated it as if it were in all respects his private inheritance. For several centuries the distinction between property held and administered by the king in right of the Crown and on behalf of the nation, and property belonging to him as an individual, was utterly effaced. After the Conquest the folk-land which had not been granted away for book-land, and remained in the king's hands as its public administrator, was thrown into one mass with what had come to the Crown by forfeitures and confiscations, and the whole was

[1] Litt. s. 135, and Coke thereupon.

[2] For example, the manor of Scotter in Lincolnshire. *Archæologia*, vol. xlvi. p. 371.

registered in Domesday as Terra Regis.[1] And whatever parts of this are described as having belonged to the Crown in the time of King Edward must be either unallotted folk-land, or land which had been allotted to the king or come to him by forfeiture to hold as book-land in his private right, and had not been alienated by him since.

Next we take up the common land. As to this there is no doubt that much of it went on being occupied and used in the old fashion down to our own time. Indeed historical records about it are scanty,[2] and the modern survival of practices which can be explained only by a general system of common ownership is the best evidence we have that the system really existed in the past, a circumstance which ought to make us careful in other cases how we draw negative inferences from the dearth of positive evidence in early times. The lands which in modern times have remained subject to communal regulation are variously known as commonable, open, or intermixed fields, and very frequently as Lammas lands. In the last few generations the progress of enclosure and partition has been rapid, and the amount of these lands has been notably diminished even within living memory. It will be convenient, however, to speak in the present tense of the facts which less than forty years ago were put on record by careful and competent observers as then actually existing.[3] Another

[1] Allen, Royal Prerogative, 152.

[2] There is one clear instance of common land in Domesday, at Goldington in Berks: Freeman, N.C. 5, 463, *n.*

[3] Select Committee on Commons Inclosure, 1844. E. Nasse, *Mittelalterliche Feldgemeinschaft*, etc.: Bonn, 1869 (Eng. transl. by Col. Ouvry, published by the Cobden Club, 1872), where details are given. The facts collected, and in fact for the first time clearly

generation earlier, about the beginning of this century, more than half the land of some English counties was under one or another variety of these usages. They differ in detail, but the general type is that from seed-time to harvest the land is divided among several occupiers, tilling each his own portion, and after the harvest (that is, on or about old Lammas day, or the 12th of August in the reformed calendar, whence the name of Lammas lands) it is thrown open for pasturage, sometimes to the same persons who have occupied them in severalty, sometimes to a larger class. The occupiers for tillage are generally bound to a customary rotation of crops and fallow, which of itself is such as to point to days of very primitive farming.[1] Many commonable hay-fields are also found which are thrown open earlier in the year, as soon as the hay-harvest is over. It is significant that these usages are stated to be most prevalent in those parts of the country where the soil is most fertile, and the land was therefore taken into cultivation at a very early time. The subdivision of the allotments for several cultivation is extremely minute, so that even a considerable owner of land of this kind will have it all in little parcels of at most a couple of acres each. It is found that where this system prevails the farmers are collected in agricultural villages, whereas in the parts where complete severalty of ownership is the rule we find scattered and independent homesteads.

brought out, in Mr. Seebohm's *English Village Community*, published since most of this book was in type, throw much light on these matters.

[1] The regular course is wheat, oats or beans, and fallow. A four-course rotation is also met with, and exceptionally the bare alternation of crop and fallow.

One cannot overlook the historical significance of such a fact; the conclusion is almost irresistible that the village in these cases represents the original township or community to which the land belonged as its *ager publicus* on a small scale, just as the folk-land belonged to the whole kingdom. It is no less fit to be noted that the country of open and common fields is also the country of small copyholds; this, however, we shall consider later,

Another fact of some importance is that, although in the modern legal theory a parish or township is not capable of holding lands, yet lands belonging to a parish, and administered by the churchwardens in aid of its other sources of revenue, are frequently met with; so frequently, indeed, that the difficulties of legal title resulting from this state of things were brought to the attention of Parliament within the present century, and in one of the Poor Law statutes the churchwardens and overseers of any parish to which land belongs were incidentally made a body corporate for the purpose of dealing with it.[1] Sometimes these parish lands are within the modern boundaries, but by no means always. For example, the parish of Sampford Spiney in South Devon lately held a piece of land in the parish of Tamerton, as much as twelve miles away. Such outlying lands can hardly be supposed to have belonged to the township in ancient times; more probably they represent mediæval gifts to pious uses. It would now be impossible, unless in specially favourable conditions which may sometimes exist, to trace the history of these parish properties with any certainty. In the case I have mentioned nothing whatever is known about it, all early records of the

[1] 59 Geo. III. c. 12, s. 17 (A.D. 1819).

parish having been lost by neglect. In some cases the use of the property for parish purposes is known to go back to the time of the Reformation or earlier. This, however, is still consistent with a gift or appropriation long since the Conquest. But the fact of gifts being made to the parish at all shows that for the popular mind it retained its existence as a kind of corporate body, though the law refused to acknowledge it. And at last Parliament, as we have just seen, had to bring the law round again to the popular view.

The village greens which still exist in many parts of the country may fairly be regarded as a remnant of old unappropriated common land. Here the modern legal theory simply reverses the order of the facts. These bits of ground used by the inhabitants for recreation are in most cases ground which never really belonged to any several owner. Not having been allotted by the township when the township was a reality, and having escaped wholly or in part from the encroachment of the lord or his agents, they remain open for common enjoyment. But the theory of the law-books is that they belonged to the lord, and that in early times he granted rights of enjoyment over it, or allowed them to grow up by way of custom. And though of late years judges have more than once admitted from the bench the historical futility of this theory, it is now hardly possible to break with it altogether for legal purposes. We now speak of a custom for the inhabitants of a parish to dance or to play lawful games at seasonable times on such and such a piece of land, the land being imagined to belong to some person whose ordinary rights over it as owner are limited by the customary use of strangers. This is really

fiction and nothing else in the majority of cases; but the fiction is inveterate.

Rights of common have a similar history, though both the facts and the legal treatment of them are more complex. The simpler case of the village green may help us to a clear understanding of the legal nature of a common. According to the doctrine of the books a common is the waste of a manor. It may happen that the wastes of two or more manors adjoin, and sometimes the common, or moor, or whatever it may be called, is a royal forest—that is, a hunting preserve created since the Conquest.[1] The presence of trees, I need hardly say, is not required to make a forest in this sense. The great mark of it is the absence of enclosures. Dartmoor is a forest, and (but for modern plantations) trees grow on it only in a few sheltered hollows. These cases offer peculiarities of their own which to the lawyer are extremely curious. But just now we will confine ourselves to the more ordinary case of a common lying wholly within the bounds of a single manor. The waste of the manor, then, is in the modern legal theory so much of the lord's land as his predecessors have not found it worth while either to take into cultivation on their own account or to let out to tenants. Those predecessors have at some remote time granted to their tenants various privileges over this unoccupied land; the liberty of pasture, or of taking sand and gravel, or cutting underwood, and such like matters convenient for the use and enjoyment of their cultivated holdings. These liberties have ripened

[1] "Foresta regis est tuta ferarum mansio . . . quasi feresta, hoc est ferarum statio."—*Dial. de Scaccario*, i. c. xii.

by long continuance into rights which the lord can no longer withhold. All the rights of the commoners are thus conceived as having been carved, as it were, out of the original full and absolute dominion of some imaginary predecessor of the existing lord. It is allowed, indeed, that in the one case of common of pasture the tenant's right might be in some measure independent of the lord's will, being annexed by law to his tenement if there was nothing to exclude it. This is the doctrine of "common appendant." But the general theory was as I have stated. We have great reason to say again, as we said in the particular case of the village green, that this theory reverses the facts. We cannot say it, however, without some qualifications. A great many of the manors now or formerly existing represent ancient communities in which, little by little, the authority of the community was engrossed by the most considerable man in it, until he became the lord, and the other landholders became his dependents. But a manor might also be formed without going through the earlier stages at all. Free dependents and emancipated serfs might gather round a lord until they formed a community comparable in size to the old free township. Under such conditions we should expect usages to spring up imitated from those of the older communities, and modelled as far as possible on them; but these usages would in such a case really owe their force to the permission and consent of the lord, as they were feigned to do by the theory of the lawyers in the case where the lord was only an overgrown member of the township. Thus we have a possible class of cases in which the theory to some extent answers to the real facts. I say

only to some extent; for even in these cases, whether they were few or many (and I am not disposed to think they were many), the usages were not invented by the tenants or the lord, but were framed on the customs already established elsewhere. On the whole, then, we may say that rights of common and all similar rights are derived either from the ancient use and enjoyment of undivided common land under the customary regulations imposed by the township to which the land belonged, or from use and enjoyment really granted by lords to their inferior tenants in imitation of the ancient customs. The old common land, then, is represented on the one hand by such remnants of the common system of cultivation as now exist in England, or lately existed; on the other hand, by rights of common and the like. In the one set of usages we have the regulation by the community of the allotment and tillage of its cultivable land; in the other the enjoyment of the unallotted and untilled land by its members for pasture and other advantages in aid of their several allotments.

Lastly, what became of the land held by individuals as their inheritance, not by the exceptional privilege of a "book" or charter, but according to the varying custom of the country, and probably without any written evidence of title at all? It is impossible for us now to get any direct proof about this; but for my own part I believe that such land went on being held by the old customs for centuries after the Conquest, and is to a great extent represented by copyholds; a form of tenure which is now fast disappearing, and may be extinct in another generation or two, but on which a large proportion of English land was held down to the

present century. We are told in all the books dealing with the history of our land laws or land tenure, from Sir Edward Coke downwards, that the copyholder of the modern and later mediæval English system grew out of the villein of earlier times. The statement is certainly true in some sense; but it is capable of so many that it is important to determine which of them we mean to adopt. The meaning of the proposition depends on the meaning of its terms. The first of them is clear enough. We all know, or may easily know whenever we please, what is meant by a copyholder. A copyholder is a tenant of a manor who is said to hold his tenement "at the will of the lord according to the custom of the manor." This means that the tenant's rights are nominally dependent on the will of the lord; but the lord is bound to exercise his will according to the custom, so that the tenant is really as safe as if he were an absolute owner. The lord's petty monarchy over the manor, whatever it may have been formerly, is now a strictly constitutional one. The tenant's title, however, is evidenced not by deeds in his own possession, but by the records of the lord's court, which show the admission of successive tenants by the lord or his steward. For this reason the tenant is said to hold "by copy of court roll." He is generally debarred from some of the rights of an absolute owner, such as cutting timber and opening mines, and has to pay fines on alienation; and often, besides these, the curious and vexatious fine in kind called a heriot on a succession. These payments represent a price paid for the lord's consent to admit a purchaser or accept the deceased tenant's heir; which once, no doubt, was arbitrary—in other words, the most

the lord could get. In the modern law the money payments have become fixed, but the heriot of the best beast, or sometimes the best chattel of any kind, may still in many cases be demanded. Also there are money rents payable to the lord which once were of substantial value, and often can be made out to have been the full letting value of the land in the thirteenth or fourteenth century. Thus much for a general notion, rough but sufficient for our immediate purpose, of the nature of copyhold tenure.

But as to the other term of the proposition, what do we mean by a villein? As far as the word goes, it is the Latin *villanus*, which in itself means nothing more than an inhabitant of a vill or township. At the time of the Conquest, and long after, the *villanus* was a personally free tenant holding land under a lord, and owing to that lord certain rents and agricultural services. The rents were sometimes in farm produce, but sometimes (and in course of time generally) in money payments representing its commuted average value. Nor were these *villani* properly so called even the lowest class of free tenants. There were others, described by various names, whose services were more burdensome, and the lowest of these must have been little better off than true serfs. It is not always easy to draw the line between the free and the unfree tillers of the soil. But there is not the least doubt that a large number of serfs existed. The proper Latin name for a man in this condition was *servus* or *nativus*. Probably most of them were descendants of the British population who had been spared in the English Conquest. At all events, they were personally in their lords' ownership, and

were at their mercy in everything short of life and limb. Whatever they held of land or goods was held only by the lord's permission and might be recalled at his will. We know that before the Conquest freemen were not uncommonly driven by want to become bondsmen. But sometimes they stopped short of this degradation, and accepted land to be held on servile and precarious terms, but without giving up their personal freedom, or their rights of property in their movable goods. We know that similar terms were after the Norman Conquest forced on many Englishmen who had been hostile to the Normans without actually bearing arms against them; and we may suspect that similar arrangements had centuries before been made, especially in the western parts, between the conquering Englishman and the conquered Welshman. There are abundant possible historical sources of precarious tenures intermediate between full security and that bare holding on sufferance which hardly ever exists in practice; and however troublesome these are to the lawyer when he meets with them, we really ought to be surprised, if at all, that there are not more of them. Only the tendency of usage to become fixed has saved us from a great deal more trouble of this kind. On the whole, we find, at and after the time of the Conquest, three distinct types of actual occupiers of the soil.

There are the freemen, holding more or less land on terms of more or less burdensome service, and called by sundry names accordingly, but on fixed terms in every case. There are the bondsmen, who are in a lord's hand and can call nothing their own, whose holdings are precarious, and who are taxed at the lord's will. And

there are the degraded freemen (whether the remnant of a conquered race, or decayed members of the ruling one), who are not personally enslaved, but whose holdings are of a servile and precarious kind. Moreover, the holdings retained the character once fixed upon them; so that by successive changes of ownership it might and did happen that the same man would hold some land by free and other by bondsman's service, and the nature of the services did not affect his personal condition. On the other hand, a serf might deal as a freeman with any one except his lord, and might, if he could, hold free land, under the risk of the lord reclaiming him. The test of a servile holding was liability to be taxed at the will of the lord. Its other incidents were in practice fixed by usage even at the time of the Conquest, and in many cases the holders acquired some kind of inchoate hereditary right.

If we bear in mind these distinctions, it is not very difficult to form a reasonable conception of the early history of copyholds. Positive proof we can hardly expect, as there is a great gap in our authorities for a century and more after Domesday, and we have hardly any detailed records in the shape of court rolls and accounts for another century after that. Unfortunately the whole subject has in modern times been confused by the ambiguous use of words. The meaning of the old *villanus*, which was at first no less honourable a name than our yeoman, became degraded after the Conquest, and both in Latin, and in the French form *villein*, it was used to stand for *nativus*, with which it properly had nothing to do. The old customary tenure by labour-rents was still called villenage, and thus the customary

tenants and the serfs became completely mixed up in the apprehension of modern text-writers.[1] Mediæval lawyers, no doubt, strove to be accurate with this awkward nomenclature. When they meant *nativus*, they spoke in express terms of a "villein by blood." They were careful to distinguish the old or privileged villenage, which was really a free though more or less onerous tenure, from the villenage of base and uncertain tenure, and again to distinguish the service due in respect of the land from the personal condition of the holder. But in later times these things were overlooked, and the result was the popular account of copyholds: namely that (in Blackstone's language) "copyholders are in truth no other than villeins, who by a long series of immemorial encroachments on the lord have at last established a customary right to those estates which before were held absolutely at the lord's will:"[2] villeins being understood as villeins by blood or *nativi*. It would be nearer the truth to say that by a long series of encroachments and fictions the lords, and lawyers acting in the interest of the lords, got people to believe that the lord's will was the origin of those ancient customary rights which before were absolute.

When we have once shaken off the false theory of Blackstone (I say of Blackstone, for I cannot find that anybody stated it so positively before him), the nature of existing copyhold customs is really enough by itself to

[1] Historical students have gradually worked out the truth piecemeal. Some of our best authorities, however, seem to think that the dependent freemen and the serfs were really mixed up by their Norman lords. This, for the reasons given in the Appendix, note C seems to me improbable.

[2] Commentaries, ii. 95. See note C.

carry conviction of their great antiquity. Of this kind is the custom of "borough-English," or, as it is more expressively called in some parts, "cradle-holding," by which the course of descent is neither to the eldest son as at common law, nor to all equally as in the old tenure of gavelkind which still subsists in Kent, but to the youngest son exclusively. Such a rule of descent is very difficult to account for. But the difficulty we now have in understanding it is some proof that it comes down from a forgotten condition of society; and the fact that it was so deeply rooted as to survive the Norman Conquest seems to show that it was ancient then. Similar customs are found in various parts of Europe, and in some cases have been kept up in modern times in spite of the modern law taking no account of them. Probably the explanation is that there was a time when each son of a family as he came of age was entitled to an allotment out of common land. Thus the sons in turn parted off from the family and were provided for, and the homestead was left for the youngest. Such a state of things is actually recorded in the old Welsh laws. It might be inferred that the custom as found in England is of Welsh origin, and is in fact a primitive usage which has survived not only the Norman but the English Conquest. In that case, however, we should expect to find it prevalent not in the south and centre, but in the west and south-west of England.

Whatever account may be given of particular customs, we need have no fear in saying that the modern copyholders are the historical successors of the old English free landholders who had inheritable titles according to local custom, evidenced not by writing but by the

witness of the neighbours, and paid dues and services originally to the State or community, and afterwards to a lord. If the copyholders now seem too few to fill so large a place in the history, we have to remember that the amount of land held on this tenure has for a long time been fast diminishing. Late in the sixteenth century one-third of the land in England was still copyhold. The archaic incidents of the tenure being found in modern practice inconvenient to everybody concerned with the land, and productive of far more vexation to the tenant than advantage to the lord, the manorial rights have in later times been constantly extinguished by agreement, and of late years under the powers of requiring enfranchisement on proper terms given by the Copyhold Acts to both lords and tenants. In various parts of the country there are customary estates of the nature of copyhold, but in which the tenant's position is still insecure. He holds for one or more lives, or sometimes for a short term of years; and renewal, though it is the rule, is not a matter of established right. This tenure is common in the western counties, and may fairly be thought to represent the terms on which the conquered Welsh population were allowed by the English settlers to retain their lands. In Cornwall there are or were[1] certain "conventionary tenants" holding by a title renewable at intervals of seven years, the tenant paying a fine on renewal. As the old customs of Brittany present analogies to this tenure not only in substance but in name, it is all but certain that the Cornish custom is

[1] The conventionary tenements of certain manors of the Duchy of Cornwall were enfranchised by an Act of 1844 (7 and 8 Vict. c. 105). I do not know whether other examples of the tenure remain.

older than the English settlement. The same may be said of the peculiar mining customs of Cornwall and parts of Derbyshire, which entitle adventurers to work mines under any man's waste land if he does not work them himself, paying to the owner the customary dues and royalties. In Cornwall this is called "tin-bounding," from the setting out of the working by bounds which is the adventurer's first step towards establishing his claim. The like custom existed in the mining districts of Devon as long as tin-streaming was there practised.

The detailed pursuit of special and local customs, however, much more the attempt to trace their history and affinities, would lead us too far. Enough has been said to show that customs older than the Norman Conquest, and perhaps older than the English Conquest, have been far more persistent, and have left far deeper marks in the modern structure of the law, than is generally understood. We must pass on to the feudal period of English land tenure, and trace the effects of the feudal doctrines and policy which for so long overlaid the ancient customs without destroying them.

CHAPTER III.

THE MEDIÆVAL SYSTEM.

THE Norman Conquest was the means of introducing great and systematic changes in the government and laws of England, and not least in the law governing the tenure of land. If we are to fix a date, however, to which to refer the active carrying out of these changes, we must look nearly a century onwards from the Conquest itself. It was the general and uniform jurisdiction of the King's Courts, represented by his judges who regularly went round the country, that achieved the work of breaking up the diversity of local customs and fixing the new pattern of English institutions. This jurisdiction was put into effectual working order under Henry II., and feudalism was at its most perfect stage in England in the first half of the thirteenth century. From the latter part of that century onwards the system underwent a series of grave modifications. Grave as these were, however, the main lines of the feudal theory were always ostensibly preserved. And to this day, though the really characteristic incidents of the feudal tenures have disappeared or left only the faintest of

traces, the scheme of our land laws can, as to its form, be described only as a modified feudalism.

In order to do justice to the feudal system we must consider it not only in its proper shape but with regard to its proper and original purpose. From the point of view of agricultural economy there is nothing to be said for it, except that the system of common ownership and cultivation which it superseded was probably still worse. From any modern point of view the surviving peculiarities of feudal law, such as primogeniture, can be defended only by those ingenious arguments which, being manifestly begotten of afterthought, appear convincing only to persons who need no conviction. But in the early Middle Ages economical excellence was not the first object of European systems of tenure, and it was impossible to make it so. Before men could settle how to hold and cultivate their land to the best advantage, they had to deal with the more pressing question how they should make sure of being allowed to hold or cultivate it at all. Feudalism was really a co-operative association for the mutual defence of the members. Considered in its application to the whole of an independent community, it was the military organisation of society appropriate to a time when there were no standing armies, and one able-bodied man needed nothing but arms in his hands to make him as good a soldier as another. A feudal State was a nation ready to take arms. The king or other supreme prince was the commander-in-chief. His immediate feudal tenants were generals, each of whom not only commanded but raised and equipped his contingent. And these contingents again were made up by the contributions of lesser

tenants, of whom some were bound to take the field with a certain number of men and horses, some only to serve in person. The plan of every chief and under-chief bringing his own men, who take their orders from him alone, is in itself much older than feudalism. It is pretty well universal in the early stages of civilisation. We see it in full force in the Homeric descriptions of the Greek host before Troy. Marks of it have remained even in modern military establishments. In the last century a regiment was regarded as in a manner belonging to its colonel; and British regiments were separately recruited and equipped by their commanding officers almost in our own time. The peculiarity of the feudal system is that this type of military organisation has increased fixity and solidity given to it by making it also territorial. Land, as the ultimate source of wealth (and at that time almost the only direct one), is regarded by the State according to its capacity for supporting the defence of the nation. It is not merely bound to contribute to this purpose by way of taxation, as was the case in England before the Conquest. Quite apart from feudalism, the burden of supplying the means of defensive warfare was universal and paramount; even in the most favourable grants of public land this was excepted from the immunities conferred on the holder. But feudalism does not stop at contribution; it makes military service, in many cases personal service, or in any case definite provision for it, the essence and the condition of the landholder's title. The land is assigned to him for the support of his military duties. To some extent this was a real historical origin of feudal tenures; in what proportions it combined with other causes to

produce the actual result is outside the business in hand.[1] Such is in any case the conception dominating the system in its finished form.

Regarding the feudal tenant as an officer settled on land rather than as owner of the land, we see the fitness of the feudal institutions. Both as to the rights and duties of the tenant, and as to the transmission of them by descent or otherwise, the efficient performance of the services is the first consideration. Freedom of alienation is always regarded as one of the natural incidents of full ownership; but there was no place for it in the doctrine of feudal tenancy. The tenant by military service was no more entitled of his own motion to put a new-comer in his place than a soldier on duty to assign his post to another. Feudal tenants had indeed powers of alienation which ultimately became equivalent to freedom for all practical purposes: but these were regarded as in the first instance not belonging to them as owners, but conferred on them by delegation from the lord under whose grant they held. Disposal by will was a thing still more strongly repugnant to the feudal theory. Before the Conquest, as we have seen, it had been the fashion among the larger landowners (though perhaps rather as a matter of special privilege than of common right); but the military tenures put a stop to this. Even inheritance by descent can scarcely be called an unqualified right in the feudal system. It existed only when there was mention of heirs in the original grant of the estate; and the heir did not even then succeed as a matter of free and common right.

[1] As to Continental feudalism see Stubbs, *Const. Hist.* i. 251; and as to the introduction of military tenures in England, *ib.* 261.

He owed the lord a payment called relief, which was the price of his full acceptance as the new tenant. In form English law preserves this conception to the present day. Dealing with land as a subject of ownership, like anything else, we should expect a grant of land to a man in unqualified terms to give him the whole interest the grantor was capable of transferring. But land, as it was not so dealt with in the feudal tenures, is still not so dealt with in our legal theory. The grant of land to a man, without specifying what estate he is to take, will to this day give him no interest beyond his own life. In the case of a will the rule has been changed by legislation, and had in various ways been relaxed earlier; but our modern wills of land belong to another and later stage of the history, and must be considered apart. On the principle that a feudal tenancy is not merely a possession, but an office of trust and confidence, it is more difficult to account for inheritance being the rule, or being allowed at all, than for dispositions by will not being allowed. The hereditary character of feudal estates had been established on the Continent, however, long before the feudal period of English law, but still under conditions bearing witness to the difference between the tenure of such estates and complete ownership. Both on the Continent and in England the inheritance of military tenures was governed by a peculiar and appropriate rule of its own, the rule now familiar by the name of primogeniture. On the tenant's death his eldest or only son took the whole of his land, to the exclusion both of daughters and of younger sons.

The actual origin of primogeniture is obscure. More or less preference is shown to the eldest son in the divi-

sion of the father's heritage by many customary laws of different nations, European and other. Such a customary law may be found still in force in the Queen's dominions no farther from us than the Channel Islands. On the other hand we find in many local customs that the same kind of preference is shown to the youngest; and it is doubtful whether this very general usage of "privileged succession," as Sir Henry Maine calls it, has in truth anything to do with the exceptional rule of exclusive succession. There are traces of primogeniture in the strict sense having existed as a local custom in England apart from feudalism, but to what extent we do not know. Wherever the institution came from, its advantages to both the lord and the tenant in an unsettled state of society, where a man might any day have to keep his goods and land by his own sword, are sufficiently obvious. The same reasons which made against free alienation of that which was not so much property as a post of defence and an office of command were yet stronger against dividing it. We see that where the feudal rules did allow division, as in the case of female co-heirs, an exception was made in the case of a chief place of arms or castle, for the avowed reason of military necessity, *propter ius gladii quod dividi non potest.* Primogeniture, accordingly, grew fast at the expense of other rules of descent. It was imported into England full-grown, and here it obtained, strangely as it appears at first sight, a more complete and lasting success than anywhere else. Its most formidable competitor, the rule of equal division among all the sons (in preference to daughters, not sharing with them as modern ideas of equal justice would have it), has held its ground only in Kent. The

opposite extreme of the youngest son's exclusive right is also found as a special and local custom, sometimes to the confusion of purchasers. Primogeniture not only drove its rivals into corners, and became the common law of English landed property, but has outlasted the abolition of the military tenures to which it was in the first instance confined. Concurrently with that abolition, however, the power of testamentary disposition became unlimited; so that the rule of intestate descent is now comparatively unimportant in its effects.

Primogeniture is only one striking example of the extension of feudal doctrine and law beyond their original sphere which took place in England. They assimilated and superseded, with few exceptions, the customs of the non-military free tenures; and even in copyholds the feudal rules of descent became largely prevalent, with the help, it may be, of ancient local customs bearing some resemblance to them. In the presence of the general law, more widely known and applied than any particular custom, these customs could not but lose any distinctive characters they may have had, and become fused in one body of rules and practice enforced everywhere by the King's courts. It is uncertain how long the process lasted. In socage land,—the land, that is, which was held by free tenure, but without military service,—the contest between primogeniture and gavelkind was still undecided in the thirteenth century.[1] It was in each case a question of fact whether the inheritance was divisible by ancient custom. There is reason to think that the King's judges established a presumption in favour of primogeniture which in a few generations

[1] See Note D.

became a fixed rule of law. By requiring every one who claimed a share according to any other custom to prove strictly that the custom applied to the land in question, and in default of strict proof applying the feudal rules, it would not have been difficult to produce in a moderate time the results that actually came to pass. It must be remembered that the total number of titles coming within the jurisdiction of the King's courts was not very large, a considerable proportion of the land being held on the inferior customary tenures which, as we saw in the last chapter, appear in the settled form of the law as copyholds. The fact that for copyholds, except in parts of the southern counties where descent to the youngest son prevails, primogeniture has become the common rule, is enough to show that in these also some similar process went on: but no specific evidence of its course is now, so far as I know, accessible. Possibly it may still exist in unexamined court rolls.

At the same time that the ancient customs of England were thus feudalised, feudalism itself was modified or corrupted. Some relaxation of its principles was the necessary condition of their being so widely applied, and the system underwent a kind of degeneration in the very completeness of its victory. The adoption of the feudal rules as the common law of all English land, but with the mitigation or omission of their essentially military features, went side by side with the formation of a society wherein a strong aristocratic feeling and community of interest prevailed among the larger landowners, and yet there was nothing like the Continental aristocracy of race. These points of contrast between English and Continental feudalism are closely akin, or

rather they are two manifestations of the same social and political difference. Where the law recognised no differences of caste, and the king's younger children remained commoners unless and until they were specially called to peerages, it was impossible that the law should make differences between the land of a peer and the land of any other freeholder. Quite in accordance with the general tendency to treat all differences of rank as political rather than personal, it was always considered by English courts that the tenure of land was unaffected by the quality of the person holding it; and this was carried out even in the case of a free man taking land of servile tenure, or a serf becoming a freeholder. The personally free holder of a base tenement performed the services, or got them performed for him, and paid the dues (with one minute exception) according to the conditions of the tenure. The serf who acquired a freehold could be challenged on the ground of his personal condition by nobody but his own lord.

Along with this reduction of tenures to a few uniform types, and severance of them from the personal condition of the landholders, there came from the thirteenth century onwards a general commutation of the services into money payments. This tendency may be seen equally in the military obligations of knight-service and in the labour-rents of socage and villein-service. And the feudal tenant's position, from having been a kind of military occupation of the land on special duty, became a complicated form of ownership, subject to periodical and occasional burdens which, having lost their original purpose, appeared as meaningless as they were vexatious.

These "fruits and consequences" of military tenure,

as they were called, were of course due to the Crown from its immediate tenants, and were thus a material part of the public revenue. Since the Restoration they have ceased to exist, and are now represented by the excise and the land-tax; but it is impossible to understand either the working of the mediæval system or its later modification without knowing the nature of these burdens, which by the middle of the seventeenth century had become intolerable, and made the settlement of the Restoration a necessity. First there were payments called *aids;* in the theory of our earlier authors they were offered of the tenant's free will, to meet the costs incurred by the lord on particular occasions; but they settled into a fixed custom afterwards, if they had not really done so when those authors wrote. The occasions in question were the ransoming of the lord from captivity; the knighting of his eldest son, "a matter that was formerly attended with great ceremony, pomp, and expense;"[1] and the marriage of his eldest daughter. The amounts payable for the two latter purposes were assessed at the fixed proportion of a twentieth of the assumed annual value of the holding by statutes of the thirteenth and fourteenth centuries. Then there was the *relief* payable by an heir of full age on his entry, which likewise became fixed at an early time. In the case of land held of the Crown, the king also took a year's profits, which was called *primer seisin*, and a fine was payable by the tenant on every alienation of the land. If the heir was under age, the king or other lord became the guardian of both the heir and the estate, and rendered no account of the profits; and on the heir's coming of

[1] Blackstone.

age a fine was payable to the guardian for quitting the land. This privilege of the lord, in many cases a highly lucrative one, was called *wardship*; and incident to it was the right of disposing of the ward in marriage, which appears to have been commonly treated as a matter of sale and barter in the guardian's interest. In the case of non-military free tenure a relief of a year's rent was payable where a rent in money or kind was reserved, and primer seisin if the land was immediately held of the Crown; and the aids for the knighthood of the lord's eldest son or marriage of his eldest daughter were also due. But the rules of guardianship were quite different; the guardian in socage was not the lord, but the nearest of kin to the heir among those to whom the land could not possibly descend; the wardship lasted only till the heir was fourteen years old (when he was free to choose his own guardian until full age), and, most important of all, the guardian was accountable. "Such guardian in socage," says Littleton, "shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir, when it pleaseth the heir, after he accomplisheth the age of fourteen years." When the military tenures and their incidents were finally abolished at the Restoration, this became the general rule; by the same statute the father was empowered to appoint persons of his own choice to be his children's guardians after his death, if he left them under age, and with this addition the ancient law remains. The statutory power of naming guardians and the careful provisions of modern settlements have made it almost forgotten.

Thus it appears that in the material point of guardianship the strict feudal doctrines were never applied to socage lands at all, while the other services and incidents of feudal tenure rapidly degenerated into a clumsy mode of taxation in money, or a source of private profit to the lord of the fee, with great opportunities for corrupt and oppressive practices.[1] It was no wonder that the military tenures should be unpopular, or that a variety of devices should be employed to escape their obligations, which had their effect in suggesting similar devices for other purposes, and ultimately producing the complicated and artificial state of our real property law. The history of our land laws, it cannot be too often repeated, is a history of legal fictions and evasions, with which the Legislature vainly endeavoured to keep pace until their results (and with them the crooked ways by which they were attained) were perforce acquiesced in as a settled part of the law itself. We have not yet mentioned an incident common to all feudal tenures, whether military or not—the possibility of the land falling back into the hands of the lord, as representing the original donor, on a failure of the tenant's heirs. *Escheat* (such is the technical name of this event) must have been a sensible branch of the lord's casual profits so long as land could not be disposed of by will. Now that on the one hand alienation by will is allowed without limit, and on the other hand sundry disabilities to take by inheritance are removed, escheat is still possible, but seldom happens. It is yet more seldom, if ever, that it happens in favour of any one but the Crown.

[1] The reader may consult Blackstone (*Comm.* ii. 76) for a forcible and probably accurate sketch of these abuses.

Feudalism in England tended of itself to settle into a kind of compromise between the rules appropriate to military tenancies, and such as would allow some tolerable convenience of agricultural occupation and peaceful commerce. But the direct action of the Crown and of Parliament likewise effectually prevented the system from being established in its full consistency. The first decisive step was taken by William the Conqueror when he exacted a direct and universal oath of allegiance to himself, overriding all feudal obligations. That one and paramount sovereignty of the Crown which has ever since been the principle of English executive government, and is stamped in every part on the language and formulas of English law, dates from the Council of Salisbury. From that day, we may truly say in one sense, feudalism was doomed. In another sense we may say that it was preserved by being made harmless against the public order of the kingdom, and reduced to its fitting place in a polity both coherent and capable of expansion. What the Conqueror's wisdom had saved England from was seen later by a terrible example, when the strength of the king's hand was for a time paralysed in the evil days of Stephen. The separation of political allegiance from feudal tenure cleared the way for the assimilation of the feudal doctrines, as a branch of civil law, by the general custom and judicial usage of the realm. In the thirteenth century there was a fairly complete system of customary land laws, as we know by Bracton's exposition. The feudal services were being reduced to something like certainty. Primogeniture was not yet fully established as the common law of non-military free tenancies, but

was rapidly prevailing over the old equal partition among sons and other local customs. In other respects the course of inheritance of freeholds, and the tenant's power of alienation in his lifetime (by will he could do nothing with his land, save in some places by special custom), depended on the terms of the grant. If heirs were not named at all, the taker had not and could not give any interest beyond his own life. If heirs were named, the grant being, for example, to Adam of Stoke and his heirs, or heirs and assigns, he could alienate whenever he chose. The interest conferred by a grant in these terms was and is the largest a subject is capable of having. It is called an estate in fee simple. "A man cannot have a more large or greater estate of inheritance than fee simple."[1] But if a limited kind of heirs were named, for example, by grant to Ralph of Hengham and the heirs of his body, or the heirs male of his body, he could not alienate until some one capable of succeeding under the special designation was in existence. In the former of the cases just put, Hengham might alienate as soon as he had a child; in the latter, as soon as he had a son. His interest was called in either case an estate in fee simple conditional, as it fell short of being a complete fee simple until the condition of an heir of the named class being in existence was fulfilled. When it was fulfilled, the special course of descent prescribed by the original grant was not affected so long as the tenant retained the land. But if, after having issue answering the description, he made a grant

[1] Litt. s. 11. The power of alienation was not established all at once; it had grown up by steps too minute and too obscure to be dealt with here.

in fee simple to another person, say Metingham, then in Metingham's hands the estate would be a common estate in fee simple, and descend according to the general rules of law. Thus if Hengham's lineal descendants, or descendants in the male line, as the case might be, ceased to exist, this would not enable the lord or his heirs to claim the estate by escheat.

This wide interpretation of grants limited in their terms, and intended by the makers to confine the estate to a particular course of succession, and preserve the benefit of the grant for the lineal heirs and the chance of escheat for the lord, was displeasing to the great men of the kingdom. In 1285 it was declared by Parliament that gifts of this kind should be strictly observed according to their form, and the tenant should have no power of alienating the inheritance to the prejudice of his issue or of the grantor. This Act is known as the statute *De Donis Conditionalibus*, or in common citation *De Donis*. Under its operation the tenant who would have had a fee simple conditional had only a limited and inalienable estate; and this, as being permanently cut down from the freedom of disposition incident to a fee simple, was no longer called a qualified fee simple, but regarded as a new kind of estate, and called a *fee tail* (feodum talliatum, taillé[1]). If after the statute land was granted, say to Metingham and the heirs of his body, then Metingham had all the rights of a tenant in fee simple as to use and enjoyment, but he could not grant away the land for any time beyond his own life. His lineal heirs succeeding under the grant were in the

[1] "Jus taliatum, hoc est limitatum, incisum aut restrictum. —Coke, 4 Rep., Pref.

same position. He and they were called tenants in tail, and the land was said to be entailed upon them. Such is the legal and only correct meaning of the term entail, which now-a-days is constantly used to express the far more complicated scheme of modern settlements.

Entails, as authorised by the statute *De Donis*, were certainly intended by the Legislature to be perpetual and inviolable. But that intention never took full effect, and before two centuries were over it was wholly set at naught. This is the first of several surprises which the learner of English legal history meets with on his way. He must not expect to find Acts of Parliament in the thirteenth or even the sixteenth century carried into execution as they are in our own time. Statutes had to be administered through judges and lawyers, who were stubborn instruments. They constantly preferred their own mind to that of the Parliament, and would contrive and encourage every means of counterworking a statute they disliked, short of disobedience to its express terms. We know nothing of the particular circumstances in which the statute *De Donis* was passed. But it is clear that it was obtained by the great landowners against the feeling of the country; and that feeling was taken up and made effectual by the lawyers. Coke, writing long after the work was done for his time, expressed the tradition of his order in terms almost of indignation. "When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts; the king and lords had their escheats, forfeitures, wardships, and other profits of their seigniories; and for these and other like cases, by the wisdom of the

common law, all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daily experience teacheth us." Later still the tradition took new life in the more polished phrases of Blackstone, who summed up the mischiefs of inalienable estates, and testified that by legal authorities they had been "almost universally considered as the common grievance of the realm." The methods by which the bonds of the statute were first relaxed and then slipped off will be better considered in connection with the other changes that brought the law of real property to its finished form. In the meantime we will turn to the other fundamental statute of Edward I. which is cited by its first words as *Quia emptores.*

This statute was made in 1290. Like the *De Donis,* it was made in the interest of the great lords; but, unlike that measure, it was accepted with satisfaction on all hands. It dealt a heavy blow to the consistency and elegance of the feudal theory, but made the conditions of land tenure far more simple. It was the first approximation of feudal tenancy to the modern conception of full ownership. Before 1290 the feudal tenant who alienated the whole of his land put the new tenant in his place as regards the lord; but if he alienated a part only, the effect was to create a new and distinct tenure by *subinfeudation,* as it is called. Thus, if the king granted a manor to Bigod, and Bigod granted a part of it to Pateshull, Bigod was tenant as regards the king, and lord as regards Pateshull. Bigod remained answerable to the king for the services and dues to be rendered in respect of the whole manor, and Pateshull to Bigod in

respect of the portion Bigod had granted him. Pateshull, again, might grant over to Spigornel a portion of what he had from Bigod, and as to that portion would be Spigornel's lord, and Spigornel would be his tenant. A person who, being himself a tenant, is lord of under-tenants, is called a mesne lord. These under-tenures were constantly multiplying, and not only titles became complicated, but the interests of the superior lords were gravely affected. The lord's right to the services of his tenant were in themselves unchanged by any subinfeudation; but his chance of getting them practically depended on the punctuality of the under-tenants, against whom he had no personal rights, in rendering their contributions to the immediate tenant. The profits coming to him by escheat, marriage of wards, and wardship, were also diminished. Many years before the statute in question the great lords had thought themselves ill used in this matter. It was provided by Magna Charta that no free tenant should alienate more of his holding than would leave him enough to perform the services (this shows, by the way, that at the beginning of the thirteenth century the feudal services and dues had ceased to represent, if they ever did represent, anything like the full annual value of the land). But this was found inadequate by the superior lords, and in 1290 the law was fundamentally changed. It was enacted that every free man[1]

[1] Except those holding directly of the Crown, to whom the same right was extended only in 1 Ed. III. (A.D. 1327). They still had either to obtain a licence from the Crown to alienate, or to pay a "reasonable fine," which in the 16th century was understood to be one year's value of the land, whereas the fee for a licence was only one-third of the annual value. The Crown, therefore, retained a considerable check on its own immediate tenants. How it was used I do not know.

might thenceforth dispose at will of his tenement, or any part thereof, but so that the taker should hold it from the same chief lord, and by the same services. The incomer became the direct tenant of the chief lord, and liable to him, and to him only, for a proportionate part of the services due in respect of the original holding. A clause curiously like the introductory clauses of modern Acts of Parliament confined the application of the statute to estates in fee simple, and fixed the day when it should come into operation. Since that day—the feast of St. Andrew in 1290—it has been impossible to create a new feudal tenure of a fee simple estate; and any chief or quit rent now payable to a superior lord out of land held in fee simple must have been created before that time.[1] The statute enabled the fee simple tenant to deal with his land as property, without consulting his lord; and in this respect it was a great economical advance. Probably it was intended to compel the owner of land to be also the occupier, or, at any rate, through his villein and customary tenants, the direct administrator and collector of revenue. If such was the intention, it was before long defeated by the general introduction of leases for years. They were already known in the thirteenth century, but received a great and sudden increase of importance in the fourteenth. The fearful depopulation that followed on the Black Death in 1348 brought about a great scarcity of labour, and made it unprofitable to keep farms in hand; and leases, which

[1] There is nothing in law to prevent the reservation of rent service or other services on a grant of an estate for life or an estate tail by a tenant in fee simple, but it has never been the practice, except in the case of leases for lives (now going out of use) of the lands of colleges and ecclesiastical corporations.

till that time had been chiefly used by religious houses as a convenient means of administering their estates, became common everywhere. Leaseholding, however, belongs to what may be called the commercial factor of English land law, and will be considered apart.

Even a summary view of the mediæval system would be incomplete without some notice of the forms and procedure used in dealing with landed property. Questions of form appear more important, in every system of law which has not reached a highly developed and rational stage, than questions of substance. We may say, if we please, and perhaps it will give a juster notion of the truth of the matter, that questions of substance appear in the disguise of questions of form. This has eminently been the case in the history of English law. Therefore it is never safe for the philosophical lawyer, and still less for the historian, to neglect points of form as being merely technical. An apparently minute technicality may be the veil of a decisive principle. With regard to landed property, the policy of English law as to its disposition has been wrapped up in a series of technical rules, and one may almost say technical accidents. The legalised usage of landowners passed from a simple but cumbrous publicity to an absolute secrecy without any direct assistance from the Legislature, and, in fact, contrary to its intention.

In all early legal systems the transfer of property, or of the more important kinds of property, has to be effected by some kind of public ceremony. Frequently, though not always, the ceremony is of a symbolic nature, and is a substitute for the actual abandonment of possession in favour of another, which is the most obvious way

of putting that other in one's place as owner. Thus the transfer of land is completed by the delivery of a turf, a bough, or a straw taken off the land, the part representing the whole of the soil itself, or of its produce. There is much reason to think that in England this was the manner in which the smaller holders of land, who knew not the ecclesiastical innovation of written charters or "books," were accustomed to transfer it before the Conquest. Certain it is that customs of this kind, long since dwindled to the emptiest formality, still exist in many copyholds. The transaction was proved by the witness of the neighbours, who attended for the purpose of keeping it in memory. When charters were introduced, it would appear that the symbolic delivery was sometimes also carried out, and recorded in the written instrument; but in the great majority of Old English charters nothing of the kind is mentioned. The "book," in fact (if the view put forward in the last chapter be correct), was the record, not of an ordinary conveyance, but of an act of State; and it was witnessed by officers of State, not by the neighbours or the popular Court. For a time it seemed as if the archaic usage of conveyance by actual or symbolic delivery of possession was to be superseded by authentic writing. But feudalism came to the rescue of archaism, and for a time restored it in an even stricter form. The lord expected to know the dealings of his tenants with their land: the tenant expected to know if he was to have a new lord. Alienation of feudal holdings, when it came to be allowed, was subject to the condition of being notorious. This was assured by requiring an actual delivery of possession before witnesses and on the land itself—a proceeding accompanied

with different forms in different countries and districts, and known by the general name of investiture.[1] In England it was called *livery of seisin;* English practice required no particular symbolic action or form of words, provided the intention was clearly expressed, though some forms are mentioned as usual; and an invitation to take possession, given in sight of the land, and followed by actual entry in the lifetime of both parties, was allowed to have the same effect. A charter, or, in later language, a deed, was also necessary, both as a permanent record and for the certain knowledge of the interest intended to be conveyed. A deed is a writing on parchment or paper, authenticated by the seal of the person whose mind it purports to declare. Seals were not used in England before the Conquest, and only by men of considerable rank for some time after; but before the thirteenth century the necessity of sealing for a deed was fully established.[2] Through the Middle Ages every man of substance had his own particular seal. In our own time a distinctive seal is hardly ever used, except by corporations; and the so-called sealing of a deed is practically nothing but a formal acknowledgment of one's signature. The process of conveying land by the combined effect of a deed and livery of seisin was called a *feoffment;* the deed was first executed, and then livery of seisin was given, and a memorandum of this was indorsed on the deed, and usually attested by the same witnesses. As a rule the deed was short and simple

[1] See Ducange, *s. v.* Investitura. A form of English mediæval feoffment may be seen in the appendix to the second volume of Blackstone; the common forms of livery are described, *ib.* 315.

[2] *Cf.* Lambarde's *Perambulation of Kent*, *s. v.* Halling; Palgrave, *English Commonwealth*, 2. lxx.

enough in its language; on the other hand the indispensable livery of seisin might easily lead to much trouble. For technical reasons there were cases in which several distinct liveries were required, as if the land being dealt with was not all in one county. Then there were the cases, probably not unfrequent in the Middle Ages, in which hostile claims or occupation made it dangerous to enter on the land at all; in such cases actual entry might be dispensed with. Local notoriety was pretty well secured by these rules, but at the cost of much inconvenience, of some bodily risk, and, it may be supposed, of sundry breaches of the king's peace. Whether the landowners of those days objected to publicity for its own sake, as their successors have persistently done for about three centuries and a half, does not appear. Legal ingenuity was for a long time, at all events, directed towards other and more pressing objects.

A cumbrous and ceremonial publicity was not less the character of judicial dealings with land. The steps of procedure in "real actions," as lawsuits concerning a freehold title were called, were many and slow; moreover there was another cause of delay, frequently the gravest of all, in the necessity suitors were under, first of finding the king's court, and then of obtaining a hearing. For the king claimed and exercised exclusive jurisdiction in all matters touching the freehold, which no doubt was one chief reason of the decay of the ancient local courts; the king's justice, before Magna Charta, followed the king's court wherever he happened to be; and in the time of which we now speak the king was seldom in the same place for many days together. Moreover, he was often in Normandy or elsewhere in his Continental

dominion, so that the suitor might have to cross and recross the Channel in pursuit of him. Add to the cost of travelling the heavy fees which had to be paid to the king's officers to get the cause brought before his court, and we may be satisfied that in the twelfth and early thirteenth centuries litigation about landed property was an even more costly luxury than it is now, or than it was in the Court of Chancery sixty years ago. This crying grievance was removed by Magna Charta. The seat of the king's justice between subject and subject was fixed at Westminster; and at the same time it was made accessible in the remotest county by the regular circuits of the justices of assize. The name of these justices and of their court is derived from their commission to try the actions for recovering the possession of land which were technically called assizes. These possessory actions were a little less cumbrous than the "writ of right" by which the general title to the freehold was decided; but they were still extremely technical, and the minute distinctions between the forms appropriate to different circumstances abounded in traps for unwary pleaders. A tenant of land who thought himself unjustly deprived of possession was naturally tempted to fall back on self-help, and re-enter, if he could, by the strong hand. But he was in danger, if he did this, of putting himself in the wrong; for there were several cases in which a wrongful dealing with land was so far effectual as to deprive the person really entitled of the summary right of entry which he could have used against a mere intruder. The true owner who had lost actual possession and the right of entry was no better off than a claimant who had never been in

possession; if he wanted to keep the law on his side, he must resort to the expensive process of a "real action." Hence it was a great object of the actual holder of an estate, where his title was questionable, to go through some of the proceedings which would destroy any possible right of entry. This, again, was a matter of trouble and expense, but it often gave practical security. Further details would not be to our purpose; but this much it is worth while to bear in mind, as helping to explain why titles to land were constantly doubtful in the mediæval period of English law, and how such a state of things was found tolerable enough in practice to escape organic reform. It must also be remembered that the shifts and fictions which appeared to our fathers of the Reform-Bill time roundabout, cumbrous, absurd, and barely honest, were introduced as a deliverance from things yet worse. The old-fashioned action of ejectment, with its dummy plaintiff appearing as the lessee of the real plaintiff, and the dummy "casual ejector," who wrote to the real defendant as "your loving friend," was more grotesque but less inconvenient than an assize of novel disseisin.

It will be gathered from what has been already said that the mediæval land system of England, such as we find it in Bracton's exposition, never really existed as a perfect system. We have seen that legislation broke in upon it almost before it was completed. We have next to see how the growth of three centuries more produced a fabric substantially identical with the law which men still living remember as their practical study, and how that growth, driven into perverse courses, was such as to make the total result, to use Macaulay's term for one portion of it, a barbarous puzzle.

CHAPTER IV.

LEGISLATION AND TRANSFORMATION.

FEUDALISM as applied to land tenure in England carried with it almost from the first the seeds of its own destruction. Between the reigns of Edward I. and Henry VIII. they took root and brought forth such fruit as led to a gradual but complete transformation. First let us watch the fortunes of the law of entail.

"Infinite were the scruples, suits, and inconveniences," says Coke,[1] "that the statute of 13 Ed. I. De Donis Conditionalibus did introduce, which intended to give every man power to create a new-found estate in tail, and to establish a perpetuity of his lands, so as the same should not be aliened nor letten, but only during the life of the tenant in tail, against a fundamental rule of the common law, that all estates of inheritance were fee simple." The fetters of the "new-found estate in tail" were grievous to all sorts of people except the great landowners, and various attempts, it appears, were made in Parliament to procure the repeal of the statute. But the landowners were strong enough to hold what they had won against any direct attack; and legal ingenuity set to work to turn the position which it was impractic-

[1] Pref. to Rep. Part 4, *cf.* 6 Rep. 40.

able to storm. This was partly effected within a short time by the application of doctrines which now seem to us of the most technical and arbitrary kind, and yet in their origin were intended to fulfil, and did fulfil well enough, the purpose of giving security to purchasers, and lessening the danger of stale or fictitious claims of title. They were devised for the case of tenants in fee simple, and before the statute *De Donis* was thought of; but the judges treated them as applicable to acts of a tenant in tail, except so far as their application would have obviously reduced the statute to a nullity. The holders of an estate tail were not regarded, as they might have been, and as the holders of settled estates are still in those Continental countries where settlements exist, as a series of mere life-tenants, of whom each comes into his predecessor's place by way of "substitution." The grantee of the new limited estate still had an estate of inheritance which might continue for ever; he was "chief owner of the land," subject to the statutory deprivation of power to dispose of it to the prejudice of his issue, or, in default of issue, the persons (if any) designated in the grant to take in remainder,[1] successively or otherwise, and ultimately the donor and his heirs. Having the freehold, the tenant could lawfully deal with

[1] When a tenant in fee simple grants a limited estate, such as an estate for life or in tail, the residual interest not thus disposed of is itself an estate capable of being separately dealt with. If, by the same conveyance, the grantor parts with it, it is called a remainder; if he keeps it, it is called a reversion. The process of subdivision may be indefinitely repeated, the fee simple being regarded as a kind of fixed quantity out of which any number of "particular estates" may be "carved:" the sum of them all makes up the fee simple, as the bits of a Chinese puzzle make up the square.

it in his lifetime; if he professed to deal with the fee simple, that was only an excess of authority, not a wholly unauthorised act; and the effect of a feoffment by him (the solemn and accustomed assurance mentioned at the end of the last chapter) was to work a *discontinuance;* that is, his issue had after his death no right to enter on the land and turn out the intruder, but had to resort to the expensive course of asserting their title by process of law, or, in the technical phrase, they were "put to their action." If the alienation was accompanied by a *warranty*—that is, a covenant by the grantor that he and his heirs would warrant the title and enjoyment of the land to the grantee and his heirs—there ensued the further consequence that the very person who claimed to set aside his ancestor's alienation as unauthorised might—under certain conditions which it is needless, and hardly possible, to specify here—find himself bound by the warranty to defend it, and in case of eviction to compensate the tenant by providing him with lands of equal value.[1] Practically, therefore, it was often possible for the actual possessor of land to give to a purchaser a better title than he had himself. And by such means there is much reason to think that the operation of the statute *De Donis* was to a considerable extent cut short from the very first.

It was not till the fifteenth century, however, that a completely effectual method of breaking through the statutory restraint on alienation—or "barring the entail" as we say—was in regular use. This was an elaborate

[1] The learned reader may see more in Butler's notes to Co. Litt. 191*a* (vi. 8), 327, and 373*b*, which deal fully with this intricate subject.

form of collusive lawsuit called a recovery—first a feigned or fictitious recovery, afterwards, when it was well established and familiar, a "common recovery"—and depending for its efficacy on the doctrine of warranty just mentioned. The device, in its simplest form, was of this nature: the tenant in tail (let us call him Littleton) being in possession, some person (say Brian) acting in concert with him would bring the real action called a "writ of right" for the recovery of the freehold (whence the name of the proceeding) claiming to be himself the true owner. Littleton, instead of defending his title for himself, would "vouch to warranty" a third person (say Catesby), from whom or whose ancestors he professed that his title was derived, and who was supposed bound to warrant the tenant against all comers. Catesby, the "vouchee," as he was called, was brought in as a party, and acknowledged the warranty. Brian, the nominal plaintiff, then asked and obtained leave of the Court to "imparl," or privately confer with him, thus providing —if one may be so irreverent as to take an illustration from the stage—a sort of carpenters' scene to cover the production of the final effect. When Brian came back into Court, as if to report the result of the "imparlance," it was found that Catesby had disappeared, "departed in contempt of the Court," as it was formally recorded. Thereupon judgment went by default against Catesby, and the lands were awarded to Brian for an estate in fee simple; as to Littleton, he and his heirs in tail became entitled to a recompense in lands of equal value against Catesby, by virtue of his supposed warranty. Thus, if Littleton's lineal heirs who would otherwise have succeeded to the entailed estate were to make any claim on

it in the future, the answer to them would be that their only remedy was against Catesby, through whose default a stranger claiming in some wholly independent right, or in the technical phrase "by title paramount," had deprived them of their inheritance. It remained to deal with the land according to the preconcerted arrangement: this was the affair not of the Court but of the parties. If Littleton's purpose was to make a sale to Brian, then Brian had only to keep the land in which the judgment of the Court gave him full title and possession. If not, Brian would dispose of it according to Littleton's directions, by reconveying it to Littleton for an estate in fee simple, or otherwise as might be desired.

The proceeding is here stated, as above said, in its simplest form; and it is supposed that all the steps in the collusive action are really taken in the regular way. But the practice of later times, as described by Blackstone, and minutely explained by the text-writers on the law of real property before 1833, was more artificial and complex. The action was not merely collusive but fictitious. Nothing was really done in the Court of Common Pleas or its offices, after the issue of the writ which commenced the supposed proceedings, but the making up of a record stating, as in the case of a genuine action, the demand, defence, voucher, imparlance, default, and judgment; the same or equivalent fees, however, were paid to the officers of the Court as if everything had been done in detail. On the other hand, the form was complicated by additional precautions intended to make sure that every possible claim of the inheritable issue of the tenant in tail, or of those who in their failure would become entitled under the further dis-

positions of the grant in tail, or ultimately of the original grantor and his heirs, should be effectually barred. The developed modern shape of a "common recovery" can hardly be understood by any one but a special historical student of the law, nor is there any need that it should. It was possible, even after these developments, to raise doubts whether the fiction was in theory quite satisfying; and the rationalising lawyers of the eighteenth century, while some of them at least inclined to think these doubts unanswerable, dismissed them as idle, and considered recoveries "as common assurances, and not at all as real transactions," the artificial reasoning by which a systematic justification of them was attempted being "a thing in its nature inexplicable."[1] One question, however, may naturally occur to the candid reader, and must not be neglected. Was not the vouchee, Catesby as we called him in our imaginary example, put in an extremely awkward position by being made liable to find a recompense in value for the tenant in tail's issue? And how was he induced to take such a risk? No doubt the position would have been anxious and dangerous for a man of substance: for, in the Middle Ages at any rate, the Court could not have confessed that it had lent the forms of its most solemn proceedings to a concerted evasion of the statute. But all trouble on this score was avoided by choosing as vouchee some one who notoriously had no lands to make recompense withal, and therefore was, as we now say, not worth powder and shot. In later times this office was assigned by settled

[1] Willes' Reports, p. 449; *cf.* Blackstone, ii. 360. This view is in substance much older; cf. Coke, 5 Rep. 40*b*, 10 Rep. 43*a*.

usage to the crier of the Court, who in this capacity was called "the common vouchee," and thus cheerfully and, we presume, not ungainfully passed his life, or so much thereof as was covered by the legal terms, in perpetual contempt of the Court of Common Pleas and liability to be fined at the king's discretion.[1] It may also seem that the nominal plaintiff in the action must have been greatly trusted by the parties: for what if after the judgment in his favour he disavowed the arrangement, and insisted on taking the thing seriously and remaining in possession? He had the strongest possible title on the face of the proceedings, and no remedy known to the old common law could touch him. It is possible that in the earlier days of common recoveries everything was really left to his honour. But before the latter end of the fifteenth century the growing jurisdiction of the Chancellor, of which we shall have to speak presently, had ample means of enforcing the fulfilment of his undertaking according to its intention. In later times the ingenuity of conveyancers made assurance doubly sure by a complication of provisoes and counterchecks which it is needless to specify.[2]

There was another and more ancient proceeding called a fine, differing from a recovery in that the collusive action was not pursued to judgment but compromised; the name is from the "final agreement," *finalis concordia*,

[1] It appears that one Jacob Morland held this curious position in Blackstone's time; see the form in the Appendix to vol. ii. of the *Commentaries*. The common vouchee or his deputy got fourpence for each recovery. (Appendix to 1st Report of R. P. Commissioners.)

[2] *Cf.* Blackstone, ii. 363, and Appendix. The practice of the early nineteenth century was even more elaborate.

which was the last step, "quia imponit finem litibus." Fines could be used to some extent for the same purposes as recoveries, and were favoured by statutes which in various ways increased their efficacy; but their action was not so certain or complete. On the other hand, they were the proper and sufficient mode of assurance in some cases where a recovery was unnecessary or inapplicable. In modern practice their regular use was in dealing with the lands of married women, which could not otherwise be effectually conveyed either by the wife or by the husband. It does not seem needful to say anything more of them here.

The method of barring entails by means of recoveries is commonly dated, as a settled practice, from the year 1472. A reported case of that date is said to mark the time when the convenient though cumbrous fiction obtained full judicial allowance. It appears to me (though indeed it is of no consequence) that this report standing alone would hardly bear out the common inference, and that our real authority is a statement made by Coke, which only professes to give the date approximately.[1] This, however, we may be content to accept; and there is no doubt about the main fact,

[1] Reeves, *Hist. Eng. Law*, iii. 328; Digby, *Hist. R. P.* 182, 6 Co. Rep. 40*a*. The earliest express reference to Taltarum's case I have met with is in the arguments in Mary Portington's case, 10 Rep. 37*a*. Coke himself evidently thought the doctrine and practice were older, *ib.* 37*b*, 38*a*. I suspect the extreme oddity of the name has something to do with the acceptance of Taltarum's case as an historical landmark. The real point was not to establish the validity of the proceedings in the recovery itself, but to determine that the issue in tail must be content with their imaginary recompense in value against the ultimate vouchee, and (what was more) that those in remainder were also fully barred.

which is, that from the latter part of the fifteenth century onwards (if not earlier) a tenant in tail might safely use the form of a common recovery to make himself, or any purchaser from him, a tenant in fee simple. The modern scheme of strict settlements dates only from the Restoration; and the intervening space of about two centuries has therefore been aptly called a period of comparative freedom of alienation. When this freedom of the tenant in tail was once established, the judges made short work of all attempts to encumber it with any freshly devised restrictions. Ingenious founders of estates endeavoured from time to time to impose on their descendants conditions or provisions against alienation which might restore in their particular cases the full effect of the statute *De Donis;* but it was invariably held that such dispositions were repugnant to the nature of an estate tail, and that the tenant could not by any means whatever be restrained from "suffering a recovery," and thereby acquiring or conferring a fee simple. The process of a recovery was treated with a kind of mystery and special reverence, and Coke tells us how one Hoord, in a case before the House of Lords, "rashly and with great ill-will inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir James Dyer, then Chief Justice of the Common Pleas, who said he was not worthy to be of the profession of the law who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority; *sed non omnis capit hoc verbum.*"[1]

[1] 10 Rep. 40*a*.

It may be as well to add that the same doctrines and inventions which served to break the strength of the statute *De Donis* were in themselves capable of being used in various other cases as instruments of downright fraud, and were prevented from being so used only by a series of special enactments which, together with their causes, are now all but forgotten.

Recoveries had originally served another purpose: their first invention was due to the ingenuity of the clergy. Religious houses abounded in England, and much of the best land of the kingdom was in their hands by virtue of ancient grants of folkland made by pious kings and under-kings, and of additional endowments received from kings and great men since the Conquest. The monasteries were, except one or two municipal corporations, the only power in the land capable of representing the arts of peace with such weight of wealth and ability as to make head against the military lords. Early mediæval chronicles show the abbots as stout, and often successful, litigants in the maintenance of their rights and privileges. The Crown and the secular lords very soon become jealous of them for political and still more for financial reasons. We have seen that a material part of the revenues of the Crown was derived from the payments made by feudal tenants on succession and other events. Now the religious communities were exempt from these payments in two ways. The lands they enjoyed by original grants creating a fresh tenure (or, in the construction put on them by lawyers after the Conquest, deemed so to do)[1] were not held on feudal conditions at all: the only service the monks had to

[1] See p. 34 above.

render to the donor was to pray for his soul and the souls of his kindred, a purpose associated with religious foundations, in one shape or another, from the Atlantic to the Indian Ocean.[1] If land held in fee simple by military tenure were granted over to a religious house, it escaped the feudal burdens by reason of the new tenant being a corporation. For the very meaning of a corporation is that a changing series of successive persons (whether being many at one time, as the mayor, aldermen, and burgesses of a town, or the master, fellows, and scholars of a college, or an abbot and his convent, or but one at a time, as a bishop or parson) is treated by the law as one continuing person. This artificial person cannot die, or be in guardianship as an infant, or perform military services. Thus when land was held by a corporation (and religious corporations were the most important class before the monasteries were dissolved) the king or other chief lord lost what were called the fruits of the tenure in any case. Naturally the secular lords were not disposed to let this process continue unchecked: and some years before the statute *De Donis* an Act of Parliament, reinforcing a somewhat vague provision in Magna Charta, prohibited the acquisition of lands by religious or other persons, "whereby

[1] "And they which hold in frankalmoigne are bound of right before God" (this means that they might be compelled by the ecclesiastical courts) "to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor, and for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord, because that this divine service is better for them before God than any doing of fealty."—Litt. s. 135. No new tenure of frankalmoigne could be created, except by the Crown, after the statute of *Quia emptores; ib.* s. 140.

such lands or tenements may any wise come into mortmain." The reasons given in the preamble are the loss of services "which at the beginning were provided for defence of the realm," and of escheats to the lords; if the reader likes, he may believe that Edward I. and his advisers were also alive to the social disadvantages that would ensue from the unlimited withdrawal of land from commerce. But the economic changes which made land really an article of commerce began only in the period of depopulation and great enclosures, from a century and a half to two centuries later. However, the religious houses did not sit down under this prohibition. Indeed attempts were made to procure the repeal of the statute;[1] but in the meantime, the clergy and their willing benefactors set about compassing their end by collusive actions in which the benefactor—now unable to make a direct gift to the abbey or other ecclesiastical society—was sued by it on a pretended claim of title and let judgment go by default. In the same session of Parliament with the statute *De Donis* order was taken against this device; but, having once become familiar to legal minds, it survived, as we have seen, in a new and wider application. For the rest, the Statute of Mortmain of Edward I. is still in force.[2] No corporation, ecclesiastical or civil, can hold land in England, save under a grant made before the statute, or a licence from the Crown, or the authority of some Act of Parliament. The word *mortmain* is a transcription rather than translation of the Latin *manus mortua*,

[1] Stubbs, ii. 126.

[2] On the connexion of this with *Quia emptores* as part of a general policy, see Stubbs, ii. 113, 122.

a term probably used, as Mr. Digby suggests, because the regular clergy against whose endowment this legislation was chiefly directed were treated for legal purposes as dead, "civiliter mortui." Coke's explanation[1] (after mentioning two or three wild ones "framed out of wit and invention") is that "the lands were said to come to dead hands as to their lords, for that by alienation in mortmain they lost wholly their escheats, and in effect their knight-services for the defence of the realm, wards, marriages, reliefs, and the like; and therefore [it] was called a dead hand, for that a dead hand yieldeth no service." Whatever be its exact derivation, the expression was felt to be forcible and appropriate, and has passed into common speech. Of late years it has been inexactly made use of in reference to family settlements, as if the "dead hand" were the hand of the settlor by whose grant the successive interests are limited, to use a technical but in this connection an easily understood word.

The difficulties thrown in the way of ecclesiastical persons and bodies acquiring land are connected with the rise and growth of a doctrine which (together with the undesigned effects of legislation intended to cut it short) has profoundly modified our land laws, impressing on them a great deal of their peculiar modern form, and fostering, if not creating, the luxuriant intricacy which makes them the despair of the unlearned. I mean the doctrine of Uses, with its offshoot the law of Trusts. Briefly, the main lines of the story are these. Disabilities to hold land as the recognised feudal tenant, or the fear of civil troubles and forfeitures for treason thereupon

[1] Co. Litt. 2*b*.

ensuing, or the desire of escaping feudal burdens, or making beneficial dispositions of a kind not sanctioned by the common law, induced men to screen the real use and enjoyment of landed property behind the names and presence of titular owners, of whom alone the ordinary judicial authority could take notice. These persons, duly constituted as legal tenants, were a shield to the beneficial owner against a variety of accidents, of which the mere possibility might then be a potent enough cause of disquiet. As between himself and the legal holder, the beneficial holder's claim to have the substantial enjoyment was at first merely precarious. In course of time it was protected by the supreme power of the king, exercised not by his ordinary courts, but through his chancellor as dispenser of an extraordinary and overriding justice. Then came jealousies on the part of the Crown and the great lords; again their privileges and revenues were in danger of being undermined by subtle evasions. An attempt was made to reverse the process by one bold legislative stroke. The Statute of Uses attempted to reunite the nominal and the substantial ownership which the practice of cunning men had separated. But the legislative had once more reckoned without the judicial power. There was no more willingness than there had been in the case of the statue *De Donis* to carry out the intention of Parliament. Not only, as in that case, was the intention evaded, but by means of a super-subtle interpretation the Statute of Uses was made the instrument of its own discomfiture; it became a landmark and a fresh starting-point in the development of the system it was intended to destroy. The points thus indicated shall be now set forth with

the least possible technicality; to hold out the promise of none would be an idle and impracticable profession.

"From a very early period the bishops and heads of religious houses, as one contrivance for evading the laws prohibiting alienations in mortmain, procured lands to be conveyed in fee simple to some friendly hand, upon trust that they and their successors should be permitted to enjoy the profits."[1] This contrivance, like others, was cut short by Parliament, and effectually as regards its original purpose;[2] but, as in the case of recoveries, it was quickly taken up by laymen who perceived the extent and usefulness of its application. In such a conveyance the land was said to be granted to the intermediary person or persons (there were generally several of them) *to the use* of the beneficial owner, and these persons, taking as they did the legal title, by the regular ceremony of feoffment (explained above, p. 72), were said to be enfeoffed, or to be feoffees, to uses. As to the beneficial owner, he was described by the uncouth phrase *cestui que use*, he for whose sake the use is: no single word was ever found to take the place of this, and at the present day English lawyers have to speak of *cestui que trust*.[3] Such were the terms most commonly employed; but the word *use* was not (as for creating estates at common law certain appropriate words were) a matter of necessity. "Trust" or "confidence" would

[1] Spence, *Equitable Jurisdiction of the Court of Chancery*, i. 440.

[2] 15 Rich. II. c. 5 (A.D. 1391).

[3] In the case of an estate for the term of a life or lives other than the tenant's (as a lease for lives), the person whose life is named is called the *cestui que vie*. I know no other example of this construction.

serve as well, or indeed anything clearly showing the intention. Assuming the feoffees to uses to be willing and faithful instruments of the beneficial owner, his advantages were great. Though he were involved in the civil strife of York and Lancaster, and dealt with as a traitor by victorious enemies, the land would be secured for his children; for it legally belonged not to him but to the feoffees to uses, and therefore was not forfeited by his attainder. For the same reason nothing was payable to the over-lord on his death; there could be no legal succession while any of the feoffees remained alive, and herein was the convenience of naming several in the first instance. The numbers might be kept up from time to time by new conveyances, as is the common practice to this day with bodies of trustees established for charitable and public purposes. Again, there was by law no power to give lands by will (except in some cities and towns by special custom); but the possessor of lands in use could without any formality at all give directions to the feoffees in his lifetime, or by testamentary declaration as to the enjoyment of them after his death.[1] In this case the feoffees were said to hold the lands to the uses of his will. It was also possible to employ the method of conveyance to uses, and it was not unfrequently employed, for the less laudable purpose of evading creditors. The debtor made over his lands to some friend on the understanding that he should still have the profits, and betook himself to one of the many sanctuaries or liberties where personal process could not

[1] Many examples of such declarations may be seen in *The Fifty Earliest English Wills in the Court of Probate, London*, lately edited by Mr. Furnivall for the Early English Text Society. And see Digby, *Hist. Law of R. P.*, p. 259.

be executed against him. "There were two inventors of uses, fear and fraud," said Coke in a summary phrase; Bacon adds, and rightly, the desire of larger powers of disposition than were known to the common law; but fraud would, in Coke's eyes, perhaps include that as well.

Down to the end of the fourteenth century or later the interests of the possessor in use were protected only by the honour of the feoffees, though he could ensure a certain measure of safety by being one of them himself, which was a very common practice. The ecclesiastical courts dared not interpose in a matter of conscience which so nearly concerned the title to land; the king's ordinary courts could not recognise interests which those who created them had studiously put outside the scope of the common law for the very purpose of avoiding the risks and burdens of legal ownership. So completely was an *use* of lands ignored that if the feoffee chose to treat the "*cestui que use*" as a mere trespasser, there was no legal defence to his action. Such a state of things could not go on indefinitely; the quantity of land held by feoffees to uses increased year by year till it comprised the greater part of the realm, and the uncertainty of titles depending on mere private understanding became intolerable. The judges might in more than one conceivable way have given some indirect protection to the beneficiary;[1] but recourse was had to the extraordinary jurisdiction of the chancellor, a power still fresh, flexible, and ambitious. It was then held that the king was in a real sense the fountain of justice. His justice was not exhausted by the functions of the regular tribunals which guided it, so to speak, in the

[1] Note E.

channels of its common application. There remained a supreme executive discretion which might be used on special occasions, a discretion which (according to modern doctrine at least) could not directly abrogate the common law, but might supply its defects or temper its application. This discretion was exercised through the chancellor, and was the foundation of the whole system of the Court of Chancery; the isolated petitions by which aggrieved subjects begged for its exercise were gradually moulded into regular pleadings, and the transcendent action of the king in his attribute of justice became the settled process of the court. Thus the possessor of land in use, complaining of want of faith on the part of the feoffees, would beseech the chancellor to relieve him "for the love of God, and in the way of charity." The king's charity, when the chancellor decided to exercise it, was masterful. Although the feoffee in trust could not be disturbed in his legal title and possession, yet, if he refused to dispose of the enjoyment and profits in the manner that seemed to the chancellor agreeable to good faith and conscience, he might be sent to prison for contempt of the king. Once habitually put in use, this power became by rapid steps a normal and systematic jurisdiction. The use of lands, as distinguished from the apparent feudal tenancy or "legal estate," became hardly less secure and a more convenient form of ownership. Broadly speaking, it resembled legal ownership in everything but the burdensome incidents; and not only the original feoffees were bound by the confidence of their grantor, but so were persons taking the legal estate from them by purchase with knowledge of their fiduciary office,

or by succession or other gratuitous title in any case.[1] In other words, the chancellors extended the conscientious obligation on which their jurisdiction was founded from the actual feoffee to uses to every one claiming title through him who had not honestly given value for the land in ignorance that his vendor was committing a breach of faith. As Bacon said, "The Chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal with the land knowing it in equity to be another's." These principles, though shifted in their application by the means and in the manner to be forthwith described, are not obsolete; the working out of them has produced the whole structure of that part of the modern law of the Court of Chancery, technically called Equity, which regulates the vast amount of property, movable and immovable, held in trust throughout England. Thus the beneficial titles to a large proportion of the land in the kingdom were being drawn into the exclusive jurisdiction of the chancellor.

Notwithstanding the difficulty and expense that must have attended an application to the Chancery as compared with proceedings at the assizes, this jurisdiction was apparently popular. But the Crown and the great lords once more took alarm. In the fourteenth and

[1] I have thought it convenient, as the learned reader will see, to use "purchase" in the text in its popular sense. The man of business (if I have such a reader) may be helped by the analogy of the special rights and immunities allowed to the *bona fide* holder of a negotiable instrument; the technical principles in the two branches of law are different, but the policy is the same. An excellent summary of the law of Uses before the statute may be seen in Blackstone, ii. 330, 331.

fifteenth centuries a series of statutes made the "*cestui que use*" subject to certain liabilities as if he were legal owner of the estates, and in one or two points gave him corresponding powers, but more for the benefit and security of purchasers than for his own.[1] At last, in 1535, the Parliament of Henry VIII. passed "an Act concerning uses and wills" which has ever since been known as the Statute of Uses, and is one of the fundamental and peculiar points of our modern law of real property. The intention was to abolish the system of uses altogether, and reunite the beneficial enjoyment of land to the legal estate; it was likewise intended to abolish the power of disposing of lands by will, which had been introduced by the machinery of uses, and was now in common exercise.[2]

The statute[3] declared that "by the common laws of

[1] Blackstone, ii. 332.

[2] Our chief authorities for the intention of the Statute of Uses are the preamble of the statute itself, and the generally similar statements made by Coke in his report of Chudleigh's case and Bacon in his unfinished Reading on the Statute. I do not find it easy to make out in detail what either of these authors really means by the restoration of the common law which is supposed to have been the object. Bacon seems to take a more benignant view of Uses than Coke, who would have liked to treat the whole system as a nuisance to be rigorously abated. Without attempting to fathom all the learning of Chudleigh's case, one may pretty safely say that Coke would have looked with unmixed disgust on such inventions as the "name and arms clause" of a modern settlement; and it is probable that such, among other things, were the dispositions which the statute was intended to frustrate.

[3] *Revised Statutes*, vol. i. p. 452. I have modernised the spelling, which throughout the statutes of Henry VIII. is in a stage of confused transition. Its "dyverse and sundry ymaginacions subtile invencions and practises" are amusing, but would distract a reader not familiar with the matter.

this realm lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin" (feoffment), "matter of record" (judicial process entered on the records of the court, that is, fine or recovery), "writing sufficient made *bona fide* without covin or fraud" (this clause lacks construction, but is, I think, to be understood as explaining or summing up the two previous heads, unless possibly it means leases for years); nevertheless, the preamble proceeds, "divers and sundry imaginations, subtil inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts," and also by wills, formal or informal, "for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance;" all which tended to the loss of feudal dues, services, and forfeitures, to uncertainty of title such that "scantly any person can be certainly assured of any lands by them purchased, nor knowen surely against whom they shall use their actions or executions for their rights, titles, and duties," and moreover to "manifest perjuries by trial of such secret wills and uses," and finally to "the utter subversion of the ancient common laws of this realm." And therefore "for the extirping and extinguishing of all such subtil practised feoffments, fines, recoveries,[1] abuses, and errors heretofore used and accus-

[1] Observe that fines and recoveries are put on a level with feoffments as common and recognised forms of conveying land. It is only the "subtil practised" conveyance to secret uses that is aimed at.

tomed in this realm," it was enacted that thereafter whoever should have an "use, confidence, or trust" in any hereditaments should be "deemed and adjudged in lawful seisin, estate, and possession" for the same estate that he had in use; that is, that he should become, instead of the feoffees or trustees, the full legal owner (or, more exactly, feudal tenant) for all purposes. Here this brief statement must suffice; there are, in fact, subsidiary provisions of some length to work out and safeguard the general idea. The result was as follows. If Stanford made a feoffment to More, Fisher, and Brooke, to hold to the use of himself, the statute made this ineffectual. Before the statute, More, Fisher, and Brooke would have become the only tenants whom the common law courts could notice, and the only persons liable for the feudal dues (which, however, would mostly never become demandable), while the Court of Chancery would compel them to allow Stanford all the benefit of the estate. By the operation of the statute, More, Fisher, and Brooke would not become owners at all; Stanford, by being named to take the use, would at once come into their place. He would be as much the legal tenant as before, and liable to all the legal burdens and incidents. A feoffment to John, or to John and William, or to John and William and Peter, to the use of Peter, or in trust or confidence for Peter, was made by the statute equivalent to a feoffment to Peter. The use carried with it the legal estate; in the curious technical phrase which has ever since been current in the books, the use was said to be executed in Peter by the statute. And the law thus made by the Statute of Uses is law to this day.

Yet the statute failed in every one of its chief objects. It abolished wills of land (though, oddly enough, not in direct terms); but so unpopular was the restriction[1] that a few years later (1540) an Act was passed expressly enabling tenants in fee simple to dispose by will of two-thirds of the land held by them in military tenure, and the whole of that held in socage. The statute was not improbably meant to put an end to new-fangled modifications of ownership by allowing no conveyance to take effect which would not have been good at common law;[2] but it was interpreted by practice and ultimately by the courts as giving full legal validity to all interests which could formerly have been created by way of use and would have been protected by the chancellor. All that the jealousy of the common lawyers could effect was to saddle this new licence of disposition with certain qualifications of a highly technical and irrational kind. Again, it was intended that there should be no use or confidence without legal ownership. But some ingenious person bethought him that the statute had provided only for one transfer or "execution" of the legal possession to couple it with the use. There was no denying that a conveyance to John to the use of Peter gave Peter the legal estate. But what if the conveyance was to John, to the use of Peter, to the use of Paul? It was not only argued, but decided and settled, that the bidding

[1] The repeal of the Statute of Uses was one of the articles of redress of grievances put forward by the leaders of the Pilgrimage of Grace in 1536. See the documents ap. Froude, *Hist. Eng.*, iii. 91, 105, 158.

[2] Both Coke and Bacon appear to have thought so. The fact that the statute wholly omits to say anything which could fairly be so construed goes, at that time, for very little.

of the statute was satisfied, or as was then said, its operation was exhausted, in making Peter the legal owner. Paul had "a use upon a use;" this interest, it was held, was beyond the scope of the statute, and must be left, like uses before the statute, to the protection and management of the Court of Chancery. "An use," said the judges, "cannot be engendered of an use."[1] In like manner if Thomas, tenant in fee simple, conveyed to John and his heirs to the use of Thomas for his life, and after his death to the use of Peter and his heirs, in trust to perform Thomas's last will, and then by his will declared that Robert and his heirs should have the land; here after Thomas's death Peter had an estate in fee simple, and Robert had no title at all in a common law court; he could only compel Peter in the Court of Chancery to let him enjoy the land, or deal with it according to his direction. In technical terms, Robert had an equitable estate, but no legal estate. Thus the chancellor's jurisdiction, so far from being cut short, was fortified and enlarged; and uses and trusts, instead of being "extirped," flourished all the more in a new form. The word trust became appropriated, as it still is, for these uses of the second order which the statute leaves untouched. We commonly hear and speak of lands being conveyed to the use of A in trust for B; the distinction is so fixed in practice and so convenient that nobody would think of neglecting it, but still it is matter of convenience only. "In trust

[1] It is difficult to appreciate this reason. Perhaps it was made plausible by its analogy to the familiar (and then commonly received) argument against usury, that it is against nature for money to beget money.

for A" or "in confidence for A" followed by "to the use of B" would have exactly the same effect.

Once more, among the mischiefs to be remedied by the statute was the secrecy of conveyances, which had been introduced through uses. The open ceremony of "livery of seisin" was to be restored to its full value, as pointing out the real owner; and in those days of sparse population and little migration, when every man knew his neighbours and their doings, it was no doubt as good a means of securing publicity as any register could have been. But how did the statute operate? It turned the possessor in use into a legal possessor; and there were other ways besides actual conveyance to feoffees in trust by which uses might be created before the statute. In particular, if Brooke agreed with Fitzherbert to sell him a piece of land, and Fitzherbert paid the agreed price, it was the rule of the Court of Chancery that Brooke was bound in conscience not only to make a proper legal conveyance to Fitzherbert, but forthwith to let him have all the advantages of ownership. By the "bargain and sale" (such was the accustomed term) Fitzherbert acquired the use or equitable interest in the land. If, then, the bargain and sale were made after the statute came into force, Fitzherbert would get the legal interest also; he must be "deemed and adjudged in lawful seisin, estate, and possession." That is, the full legal ownership of land would be transferred from one man to another by acts which might be strictly private, need not be recorded in writing, and might be incapable of legal proof.[1] So manifest a danger did not

[1] At that time and long afterwards parties could not be witnesses in a court of common law.

escape notice. It was seen that without fresh legislative precaution lands might pass from one to another "on payment of a little money in an alehouse," as one or two of the old books say. In the same year with the Statute of Uses an Act was passed to the effect that no estate of inheritance or freehold, or any use thereof, should be conveyed by bargain and sale, unless the bargain and sale was made by deed, and the deed enrolled[1] within six months either in one of the courts at Westminster or in the county where the land lay. This was intended to provide, and did provide for some time, that land should be dealt with either by feoffment, by the still more solemn "matter of record," or by deeds publicly registered. But the invention of lawyers was at length too much for the precautions of Parliament. The Statute of Enrolments had nothing to say of estates less than freehold, such as a term of years. Interests for a term of years (of which more in their place under the head of Landlord and Tenant) had become familiar; and probably the makers of the statute thought it unnecessary and impracticable to impose the formality and expense of an enrolled deed on farmers' tenancies. Here, however, was an unsuspected loophole. It was discovered that since the Statute of Uses a bargain and sale by Dyer (having the freehold) to Anderson, suppose, for the term of one year, put Anderson in the same position as if he had actually entered on the land; for by the words of the statute he was to be "deemed in lawful

[1] An enrolment is an official copy made on a roll of parchment. Before 1849 the authentic text of Acts of Parliament was the engrossment on the Parliament Roll: now a copy printed on vellum has taken the place of this.

possession." Now a tenant in possession could acquire the freehold by a simple deed (called a release) from the owner of the reversion. Livery of seisin could not be given to one already in possession, and the fact of possession (which by the old law implied an actual entry) was thought to supply the notoriety of a feoffment. In the present case Dyer, the day after making the bargain and sale for one year, would grant by release to Anderson, who was now in constructive possession by the Statute of Uses, his remaining interest or reversion in the freehold. Thus Anderson might become tenant in fee simple without any publicity at all, and the Statute of Enrolments was evaded. This process was called a conveyance by lease and release, and was the common method of transferring freehold lands for more than two centuries. Doubts were for some time entertained as to its validity, but by 1620 the point was considered no longer open to discussion.

Thus was the secrecy of modern English conveyancing established. Its lines were fixed by the results of the Statute of Uses, and what legislation has done since amounts to little more than the simplifying of its formal elements. "A system of infinite subtlety, but answering, it must be acknowledged, most important purposes, has been framed upon this Statute, while most of the evils which it was meant to remedy remain."[1] The frauds and other mischiefs which our ancestors not without reason apprehended have been in part provided against by the systematic development and refinement of the jurisdiction of the Court of Chancery, and in part by the ingenuity of counsellors. In

[1] *First Report of Real Property Commissioners*, p. 8.

the course of the seventeenth and eighteenth centuries conveyancers worked out a system of private investigation of titles which is still in use, and which, though exceedingly [1] cumbrous and expensive, is fairly effectual. One can only say fairly effectual, for there remain possibilities of fraud which no ordinary precaution can exclude, and from time to time great hardship is thereby caused to persons who have laid out their money in good faith and have not failed in any point of due diligence.

Other causes too were at work to break up the feudal scheme of land law. The military services were obsolete. Spain was teaching the world the power of disciplined standing armies, and the growing use of firearms brought in a need of copious and uniform munitions of war such as the old assize of arms [2] could not meet. Warlike equipment and organisation were henceforth more and more to be the immediate charge of the State. In this and other ways the feudal tenures had lost their original significance; and the money payments to the Crown and other lords appeared no longer as natural incidents of tenure, but as vexatious burdens on the full dominion of an owner. Even the fact that the decrease in the value of money had already greatly lessened such of them as were set at fixed amounts operated, we may well think, in the same direction. The same man who as tenant would cheerfully pay a substantial rent will, as soon as he regards himself as owner, resent the payment of much lighter but apparently casual and

[1] I should have said intolerably, but for the fact that landowners have so long tolerated it.

[2] Sundry statutes and ordinances known by this name enjoined all free men to keep in readiness a contribution of warlike weapons and equipment, which was graduated according to their rank.

arbitrary demands. Then the besetting ambition of lordship, "an excess of will in men's minds, affecting to have assurances of their estates and possessions to be revocable in their own times, and too irrevocable after their own times,"[1] was all the more stimulated; nor did professional astuteness fail to devise the means of satisfying it. How the feudal tenants of England were definitely made real owners, and how the licence of disposition and posthumous control which the Statute of Uses seemed to make unlimited was, not by the baffled legislature but by a fresh exercise of judicial power, confined within certain though liberal bounds, shall be told in the following chapter. The Statute of Uses marks the close of the mediæval epoch, and introduces a time of transition during which a new system works itself out, a system which after the Restoration is continued without any notable break down to our own time. A landmark so prominent and so memorable demands a pause before we pass on.

[1] Bacon, *Reading on the Statute of Uses* (Works, vii. 409, ed. Spedding).

CHAPTER V.

DEVELOPMENT OF THE MODERN LAW.

THE century that followed the passing of the Statute of Uses was a time of great legal activity in all directions. During the latter half of the sixteenth and the first half of the seventeenth centuries the books were produced which, for most practical purposes, have long been regarded as the ultimate evidence of English Common Law. Coke's Commentary upon *Littleton's Tenures*, eminent in the charmed (and long since closed)[1] circle of "books of authority," was published in 1628. About the same time began the publication of printed reports of judicial arguments and decisions, a kind of publication which has gone on increasing till it has now swollen to a vast and unmanageable bulk. The advice of Coke to students, that "it is ever good to rely upon the book at large," has become a precept beyond human powers to fulfil, and the text-books of special subjects which digest and methodise the matter of the reports are themselves groaning under the burden. But in those days

[1] Sir Michael Foster's *Discourse of Crown Law* (1762) was, I think, the latest addition. Blackstone, and some few later books, come very near, but only near, to being authoritative in the technical sense.

lawyers had more leisure. They found time to debate fully all the points of interest raised by a case, whether the solution of them was necessary for the actual decision or not; and, with all their pedantry and occasional perversity of intellect, they held fast to a high and serious conception of the profession they followed and their duty to it as a science and an art, which the modern practitioner must for the most part be content to envy. The law of real property got its full share of the discussion and development that went on in this period. Yet the results of the Statute of Uses were long in ripening. Indeed the final touch was not put to them till the year 1833, on the very eve of the modern period of reform, when the limits of the "rule against perpetuities" were settled by the House of Lords. Practically, however, the structure of family settlements of land had assumed its modern form before the Restoration, and the practice of conveyances became, from the seventeenth century onwards, a fixed and well understood routine, improved in details from time to time by addition or variation, but preserving its main points unchanged.

The general scheme of a "strict settlement" is of this kind. Let A be a living landowner who has a living son B, and wishes to keep his estate "in the family" as long as possible. For simplicity's sake, we will suppose A to be tenant in fee simple to begin with. A conveyance is executed by which A becomes tenant for life, and B tenant for life after A's death; or else A by his will makes B the first tenant for life. Then an estate tail (generally in tail male) is given to the first son of B—a person not yet in existence, and who may never come into existence; and similar estates are given to B's

second and other sons in succession. Each of these dispositions can take effect only if every previous estate tail fails to begin, or comes to its natural end, by persons entitled to it not existing or ceasing to exist. Thus if the estates are in tail male, and B has three sons, the third son, or any of his descendants in the male line, can become tenant in tail only if the two elder sons and all their descendants in the male line, if any, are dead, and none of them has exercised his power of barring the entail—a power of which no tenant in tail can by any device whatever be deprived. There will follow, probably, similar dispositions in favour of B's sons in tail *general*, so as to admit their descendants in the female line after those in the male line; then other and somewhat less elaborate ones in favour of B's daughters; then, again, A's children other than B, if he has any, and their possible descendants,[1] and also (in the case of a settlement made in A's lifetime) A's children who may yet be born, are provided for in a series of successive "limitations" of the same type as those already described. In the remote contingency of all these dispositions running their full course till every specified line of descent is exhausted, the ultimate "remainder" (see p. 77 above) is usually declared to be for A's "right heirs," that is, the person or persons who, at the time when the previous interests have been worked out, may answer the description of A's heir according to the common course of descent of a fee-simple estate.

[1] It is a question of detail, on which the practice varies according to the desire of parties in the particular case, whether the descendants in the male line of the settlor's younger children are postponed or preferred to descendants in the female line of the elder ones.

This may seem pretty complicated, but it is the least complicated part of a modern settlement. Practically it is only in rare cases that the remoter interests so carefully mapped out ever come into possession. If all things happen as is desired, the regular course is this:—B becomes tenant for life on A's death. He has a son C (born either during A's life or afterwards, it matters not which), who is "tenant in tail in remainder." English lawyers do not say that he *will be* tenant in tail when the life tenancy comes to an end, but that he *is* tenant in tail subject to B's life estate. Suppose that C comes of age in B's lifetime. He can now without B's consent bar the entail as against his own issue, but not as against those "in remainder;" in other words, he can neither sell nor borrow to much purpose, for a title depending on the continuance of his descendants, which is all he can give to a purchaser or borrower, is a precarious and speculative thing.[1] This check on C's power of alienation is a result of the technical necessities of the old "common recovery," which could not be carried through to its full effect without the aid of the person in actual possession of the freehold. When fines and recoveries were abolished in 1833, a new but substantially equivalent check was provided by the Legislature, the purpose of

[1] The curious kind of estate created by the conveyance in fee simple of a tenant in tail not in possession, without the concurrence of the owners of estates preceding his own, is called a *base fee*. Though uncommon, it is not unknown in practice; and it has been used by George Eliot in *Felix Holt*, with great effect and with perfect correctness, as part of the machinery of the plot; insomuch that conveyancers reading the novel have been known to lament seriously, as if the thing had happened to one of their own clients that the parties did not take better advice.

that measure being only to simplify the form of proceeding and put an end to fictions and useless expense. Since that date B would be "protector of the settlement," and his consent to any disposition by C is an express and direct condition for its validity against the ulterior interests created by the settlement. B then stands in a commanding position towards C; B and C between them are masters of the estate, while C alone can do very little, and B alone—except in the extraordinary contingency of all the subsequent limitations failing—can do nothing beyond the term of his own life. And when B proposes that C, in consideration of being adequately provided for during the rest of B's life, shall join in making a new settlement in which C shall be only a tenant for life, and other successive limited interests shall be laid out in the same fashion as in the former one, but with C and C's issue in the place of B and B's issue, there is not much probability that C can or will refuse. This process is repeated, as occasion serves, from generation to generation; and so long as it can be kept up the estate is never in the hands of an absolute owner.[1]

Hence arose the necessity for the further complicated machinery which, as already hinted, must be added to these dispositions (I speak for the moment without regard to recent legislation, of which more in its due place afterwards). If things stood merely as now described, there would be no provision made out of the

[1] The process of settling and resettling family estates has repeatedly been described in forms intended to be more or less intelligible to the lay public. I have purposely written my own account without referring to any other; not that I can hope to be more successful than my predecessors.

estate for the younger branches of the family (save in the remotely contingent event of some of them coming into possession of the whole), and no means of making any. Neither would there be any means of effecting a sale or exchange of any part of the settled estate, granting leases, or exercising many other necessary and usual functions of an owner, during the minority of a tenant in tail. And here the wide and flexible applications of the Statute of Uses (undreamt of by its authors) come in. It would be possible, indeed, without the aid of the statute, to effect most of the purposes of a modern settlement, if not all, by conveying the whole estate to trustees in the first instance, who would, like feoffees before the statute, have the legal fee simple, or, in other words, would be the only persons whom a court of common law would recognise as owners. Such a course might nowadays be viewed with equanimity by lawyers and landowners, and in fact it is sometimes adopted in settlements made by will. But two centuries or even one century ago there was still a kind of magic in men's apprehension about the "legal estate." It is still true in strictness of theory that an "equitable estate," as we call the interest of a person beneficially entitled under a trust, is not perfect ownership—a right available against all the world—but is only a right to claim the profits and enjoyment of ownership from the determinate person who is the trustee. The beneficiary is in the same position as the old "cestui que use" before the Statute of Uses. Increased security has been given to this kind of interest by the full but gradual development of the jurisdiction and jurisprudence of the Court of Chancery; the trustee's obligation being extended to all persons

deriving or claiming title through him otherwise than for value, in good faith, and with due diligence of inquiry. This process was still in its youth at the time of the Restoration, and it may well be thought that nothing less than the power given by the Statute of Uses to devise complex modifications of the legal ownership itself would have sufficed to strengthen the hands and embolden the invention of Orlando Bridgman and his contemporaries.[1] Broadly speaking, there are two kinds of objects for which the special powers and provisions now in question are introduced: the benefit and support of wives and younger children of the successive holders of the estate, and the general management of the estate for the advantage of all parties interested in its profits. These objects are effected partly by the action of the person for the time being in possession, partly by the intervention of trustees named for that end in the settlement itself, and through an ingenious and intricate machinery which is far too artificial to be described here. It is enough to say that the machine has been brought to great technical perfection by the experience of about two centuries, and, when constructed by a skilful artist who takes advantage of all known improvements, works with much less friction than might be expected. On the other hand, if the workmanship is not first-rate to begin with (and for various reasons—haste, ignorance of country practitioners, or what not—it often falls short of this standard), very serious trouble

[1] Orlando Bridgman, who gained great fame as a conveyancer before and during the Commonwealth time, and was afterwards Lord Keeper, is credited with the invention of the "strict settlement" in substantially its present form, avoiding certain risks to which it had before his time been subject.

may ensue. With regard to the special trustees just mentioned, it must not be supposed that they exercise much discretion of their own. As a rule, they are little more than wheels in the machine, the management of which is in the hands of the family solicitor, fortified at need by the opinion and advice of counsel. It would be considered meddlesome if they offered to exercise their powers before they were asked. At the same time they are fully answerable for what is done by them on the usual request and advice; and they are mostly persons of such weight and standing as to be above suspicion of conniving at any reckless or improper dealings with the settled estate. In short, the trustees of a family settlement are something like the constitutional safeguards of a complex political system; their presence is, in ordinary circumstances, hardly perceived, but they hold great powers in reserve which may be used with effect on an emergency.

The parallel just now suggested is not a casual one. There is nothing, perhaps, in the institutions of modern Europe which comes so near to an *imperium in imperio* as the settlement of a great English estate. The settlor is a kind of absolute lawgiver for two generations; his will suspends for that time the operation of the common law of the land, and substitutes for it an elaborate constitution of his own making. These constitutions are in fact all modelled on the same, or very nearly the same, type; for the desire of great landowners has constantly been to make the strictest settlements which the law would allow, and the law, as we shall immediately see, has set bounds, though liberal ones, to the power of fettering inheritances and suspending absolute owner-

ship. And the ingenuity of conveyancers, devising how to satisfy private ambition to the utmost within the field left clear to it by public ordinance, has produced that curious and exquisite structure which, a hundred years hence, may peradventure be as much abandoned to the care of a few legal antiquaries as the learning of disseisin and collateral warranty. But a correction is needed when we speak of the family settlement as a constitution; for though it resembles a modern political system in its multiplication of checks and counter-checks, and in the tacit or half-expressed understandings by which its working is made practicable, there is another respect in which it is more fitly compared to the customs of an Oriental despotism. When the authors of a settlement have once made their disposition, it is like the law of the Medes and Persians rather than the acts of a modern legislature. They are as powerless as the great king of old to alter their decrees, unless they have made special provisions for that purpose which are not usually made in practice, and which indeed would be inconsistent with the main object of making the estate as a whole as nearly inalienable as possible.

It might be a topic of curious meditation for the student of comparative jurisprudence to note how well the English landowning families have striven, though all unconsciously, to reproduce in our modern society something like the image of an archaic Aryan household. There is at the head of all the eldest living male ancestor, revered by his descendants and inferiors, and exercising great control and influence in divers ways, and yet with his power over the family property strictly limited—in

the ancient household by custom, in its modern counterpart by accustomed convention. There are the women and younger generations of the family, subject to the house-father in one sense, and yet having rights in the common inheritance which he cannot interfere with. The free dependants, not members of the family, who swelled the state and substance of the ancient household, may well enough be represented by the modern tenant-farmers. Only the highest and lowest extremes of the community are wanting. Slavery and serfdom are happily long since extinct in our land; and so are the rites of the domestic altar, which were for the ancient Aryan family the bond of fellowship, the assurance of the departed ancestors' welfare, and the pledge of their favour to the living. Some brilliant theorists have sought in these the very origin of property and inheritance; and to this day the worship of household gods and ancestors is in full force in India, and lies at the foundation of the law which English judges administer to the Queen's Hindu subjects. The most fearful imprecation by which a Hindu can bind himself is that, if he speak falsely, he may have no son to deliver his soul from hell by due performance of the sacrifice. But hardly can a faint survival of such old-world usage (though much of the abiding human passions which only change their garment from age to age) be traced by the modern observer's fancy in an English estate. He may speculate on a remote connection of Pitris and Lares with the domestic chaplain, the ancestral monuments in the parish church, or the family pew. Or, when he notes who is now the real possessor of the secrets of the estate, the real familiar spirit at whose

bidding the magical powers of the settlement are called forth, and without whose aid no matter of weight can be undertaken, he may peradventure dream that "the disestablished Lar," to use the term of a recent ingenious writer, is not dead but transformed, and lives embodied in the family solicitor.

We have said that the modern form of settlement dates, roundly speaking, from the Restoration. But already in the sixteenth century, when controversy was keen about Uses and the effect of the great statute, lawyers had an inkling of what was coming. And their opinions of the invidiousness and social inconvenience of strict settlements (or even of dispositions falling far short of what we now understand by the term) were such as would now be called Radical. Coke has been quoted in the last chapter. Let us hear Bacon:—

"First [it is said] that it is a wisdom and foresight for every man to imagine of that which may happen to his posterity, and by all ways establish his name. To this I answer that it is a wisdom, but a greater than even Solomon aspired after, who had a large heart, as the Scripture saith. For I find that he uses other language, when he says that he must leave the fruit of his labour to one of whom he does not know if he shall be a fool or a wise man. And yet does he say that he shall be an usufructuary or tenant restrained in a perpetuity? No; but the absolute lord of all that he had by his travail. So little did he know of these establishments. . . ."

Whether Solomon had any land by his travail, in the modern sense of having a thing in absolute ownership, we need not stop to inquire. As king he was no doubt,

in a sense, lord of the soil of his kingdom; but, if he was like other Eastern kings, he could not lawfully dispossess the meanest of his subjects who duly paid the customary revenue. Private ownership of land, at any rate, has been of slow growth in the East. Under the ancient rule of custom which is slowly decaying before our eyes in India the land belonged to the village or to the family, and was inalienable, though the possession and enjoyment might change hands within the circle of joint owners. The Hindu joint family is the true and ancient perpetuity. Later attempts at founding perpetuities by way of entail, *majorat*, strict settlement, and the like, are the rebellion of a privileged class against the tendency of the civilised world towards absolute and several ownership, as the schemes of Socialists and other visionary reformers for "Land Nationalisation," or whatever else it may be called, are the rebellion of those for whom the education of the world goes too slowly, and who vainly seek a charm that shall redress in one instant the balance of life between rich and poor. But Bacon has more to say to us. Let us hear him further:—

"Some young heir when he first comes to the float of his living outcompasseth himself in expenses, yet perhaps in good time reclaims himself, and has a desire to recover his estate; but has no readier way than to sell a parcel to free himself from the biting and consuming interest. But now he cannot redeem himself with his proper means, and though he be reclaimed in mind, yet can he not remedy his estate.

"So, passing over the considerations of humanity, let us now consider the discipline of families. And

touching this I will speak in modesty and under correction. Though I reverence the laws of my country, yet I observe one defect in them; and that is, there is no footstep of the reverend *potestas patria* which was so commended in ancient times. . . . This only yet remains: if the father has any patrimony and the son be disobedient, he may disinherit him; if he will not deserve his blessing, he shall not have his living. But this device of perpetuities has taken this power from the father likewise and has tied and made subject (as the proverb is) the parents to their cradle, and so notwithstanding he has the curse of his father, yet he shall have the land of his grandfather."[1]

The term perpetuity, as here used by Bacon, and constantly used by modern lawyers, signifies a disposition which attempts to make property inalienable beyond certain limits fixed, or conceived as being fixed, by the general law. What, then, are those limits? It was long before they were ascertained. In Bacon's time, and for a century later, the legal question was still open to be argued on wide grounds of policy. There was no obvious limit to the time within which trusts, or dispositions operating under the Statute of Uses, might be calculated to take effect. Yet it was felt that a limit there must be. It was agreed that "the rules of the law to prevent perpetuities are the polity of the kingdom," but nobody knew what the rules were. A long series of experiments, extending into the second quarter of the eighteenth century, determined the limits of safety for founders of families. Yet another century passed

[1] Argument in Chudleigh's case. Works, vol. vii. pp. 632-635, ed. Spedding.

before the rule was finally settled in all points. In order to understand the form which it took, we must go back to the older law. Quite apart from the learning of Uses, it was possible, at any time after the statute *De Donis*,[1] to grant by one and the same conveyance an estate for life, say in the manor of Dale, to Markham; and, subject to his life interest, an estate tail to Martin; after the determination of that estate another estate tail to Newton, and so on through any number of persons, till some one was named to take an ultimate fee simple, after which there was nothing more to dispose of. Martin, being of full age, could at any time, but not without Markham's concurrence while Markham's life estate was in existence, "suffer a recovery," in the manner explained in the last chapter, and thus acquire and dispose of the fee simple, when all the subsequent dispositions made by the original grant would go for nothing. So far, then, the manor is inalienable until Markham's life estate ceases, or Martin, if an infant at the date of the original conveyance, is twenty-one years old, whichever of these events happens latest. But it was not necessary that Martin, a person in existence, should be named as the successor after the first life estate. After some doubt[2] it was settled that an estate for life might be given to Markham, and an estate "in remainder" for life, in tail, or in fee, to Markham's first son, though at the time of the gift he had no son. The series of dispositions which form the groundwork of a modern settlement, as above described, are only the full

[1] The legal reader will remember that a remainder over could not be limited upon a fee simple conditional at common law.

[2] Digby, *History of Law of Real Property*, c. 5, § 3.

application of this principle. But it was not, and is not, allowable to give an estate for life to Markham's first son, after that another estate for life to the first son of that son, and so following—by which means, if allowed, the estate might have been made inalienable for an indefinite time. The possession could not be secured for Markham's descendants in the male line further than by giving an estate tail to his first son; nor indeed was the security perfect even so far, for if no son was in existence at the date of the settlement it was still in the father's power to destroy the "contingent remainder" which, when a son was born, would become "vested" in him and beyond the father's control. Suppose a son born and his interest unimpaired. That son might possibly be born in the last year of Markham's life, or even some months after his death. In that case twenty-one years might elapse from Markham's death before any one had power to alien the fee simple of the manor. But whenever a tenant in tail of full age is in possession, he can dispose of the fee simple notwithstanding any attempt made by the terms of the settlement to prohibit or restrain him. So it comes to this, that the farthest period until which alienation can be restrained by settlement, apart from provisions taking effect by way of use or trust, is the end of twenty-one years, and exceptionally something more, after the death of some person living at the date when the settlement is made.

Now uses and trusts were not directly amenable to these rules. Being originally nothing else than directions to the "feoffees to uses"[1] to allow the profits of the

[1] P. 90, above.

land to be enjoyed by persons named by the feoffor, or to be ascertained in the manner pointed out by him, which directions were enforced by the Chancellor as binding on the feoffee's conscience, they had nothing to do with the rules of the common law as to the creation of estates. These newly-modelled interests might, under cover of the feoffee's legal possession, be made to shift about in the most capricious fashion. By the common law Fortescue could not give an estate to Brian and his heirs so long as they should use the name and arms of Fortescue, and if they did not, then to some one else. But when uses were established Fortescue might enfeoff Moyle and his heirs to the use of Brian and his heirs until any of them should cease to use the name and arms of Fortescue, and then to the use of Prisot and his heirs. And as far as theory went, the contingency might have been something wholly unconnected with the estate and beyond the parties' control—for example, until Herne's oak in Windsor Park should fall, or until a new Pope should take the name of Leo. There were other contrivances, more complex in form but similar in principle, by which like results could be produced for a variety of purposes.[1]

[1] "Uses of this class," said a learned and accurate modern writer (William Hayes, *Elementary View*, etc., 1840, s. 31), "may be described as altogether eccentric; as deviating from the course prescribed by the original laws of the system, not without considerable disturbance of its ordinary operations." It is said that by common law "a man may have an inheritance in fee-simple in lands, as long as such a tree shall grow, because a man may have an inheritance in the tree itself" (*Liford's* case, 11 Co. Rep. 49*a*). This raises a very curious and difficult question, on which the learned reader is referred to Note F. In any case, a remainder over could not be limited after such an estate.

Neither the judges who had broken through the express terms of the statute *De Donis*, nor the successors who inherited their tradition, could be expected to tolerate this new-found way of fettering the possession and inheritance of lands. And, in fact, there was not (what one might look for) a crowd of daring attempts to push forward to all lengths in that course, but settlers of estates rather felt their way step by step till it was known how far they might venture; so little doubt was there that the Courts would once more hold themselves authorised by the general "policy of the law" to make new law for a new mischief. The rule was at last settled by analogy (an analogy more felt than expressed) to the course of the common law. Not without sundry fluctuations of both opinion and judicial decision, it came to be understood, towards the middle of the eighteenth century, that a disposition of any kind of property[1] intended to take effect in the future must be so framed as necessarily to take effect, if at all, after a lapse of time not exceeding twenty-one years from the death of some certain person, or of the survivor of certain persons, who are living at the date of the settlement if it is made by deed, or at the date of the testator's death if it is made by will. As late as 1833 it was decided by the House of Lords that these twenty-one years need not have reference to the infancy of any person. In particular cases the rule of law which treats an unborn child as a person in existence for all purposes of his benefit may have the effect of adding some months to the time allowed. A disposition which goes beyond

[1] The rule is not confined to land, though we now have to do with it only in that application.

these limits is said to be "bad for perpetuity." Thus a gift to the first child of A (having at the time no children) who shall attain the age of twenty-one years, or to all his children who shall attain that age, is valid. A gift to the first son of A who shall attain the age of twenty-five years is of no effect, and it makes no difference that A may in fact have a son who attains that age in his own lifetime. Again, a gift by will to the first person who shall climb up the cross of St. Paul's after the testator's death is "void for remoteness," though somebody may peradventure do the thing within a week; if the gift were to the first person who should so climb within twenty-one years after the testator's death, it would be good.

The rule, it must be well marked, does not prevent an estate in remainder or reversion from being made expectant on an interest which may, or which naturally will, endure for a much longer time. For English lawyers regard an estate in remainder or reversion not as a future interest, but as a present interest subject to the "particular estate" which together with the remainder or reversion makes up the fee simple. To illustrate this by common cases:—If Holt grants an estate tail to Powell, with remainder to Finch in fee, Finch has the fee simple subject to Powell's estate tail, and can dispose of his interest at once, though it is uncertain when it may take effect by the failure of Powell's heirs under the entail, or whether (since Powell or any of his successors can bar the entail and acquire the whole fee simple) it will take effect at all. Holt will be in the same position if, instead of granting the fee simple subject to the estate tail as a *remainder*, he keeps it as his *reversion*; he can

at once deal with it for what it is worth as he thinks fit. Again, Bayley grants a lease to Buller for ninety-nine years. If Bayley tries to provide that at the end of the ninety-nine years the person who is then his eldest living male descendant shall have the land, this is "void for remoteness," as the creation of an interest to take effect after the lapse of more than twenty-one years. But if he leaves it alone, he has a perfectly good reversion by the common law, which he may dispose of now or hereafter as he thinks fit, no less than if it were land in his actual possession. If he sells, it is commonly said that he sells the ground rent; but in legal conception and language he sells the land itself subject to the lease; and if the lease were for a thousand years, the legal doctrine would be the same.

Such is in outline the "rule against perpetuities," which, as regards these general principles, is now a settled part of our law. Many curious questions might still be raised on the application of it in various circumstances; but the skilled and cautious routine of conveyancers is for the most part, though not invariably, successful in keeping clear of them. Certain points in the legal theory are also still unsettled, but it would be unprofitable to explain or discuss them here.[1]

The rule prevents property from being made certainly inalienable beyond the limits of time fixed by it. But it would not be correct to say that the property must therefore be in fact alienable when the restrictive dispositions have run their full course. There must then be some person absolutely entitled, but that person may be an infant or a lunatic, so that yet another generation

[1] See Note F, On Settlements and Perpetuity.

may elapse before there is an owner with full and active power of disposal.

The questions thus decided arose for the most part upon dispositions by will. The Statute of Uses, as we saw, was intended to make the devise[1] of land by will thenceforth impossible; but the prohibition gave so much offence as to be soon removed, though for the time to a limited extent only, by the Statute of Wills of Henry VIII. (p. 97 above). And it was held that, dispositions by will being once allowed, either the Statute of Uses or its analogy (it matters not which) was applicable in their favour. Thus a man could, and he still can, by his last will, as well as by acts executed in his lifetime, create interests unknown and indeed repugnant to the doctrine of the old common law. Persons making wills are notoriously more adventurous and capricious than those who make settlements to take effect in their lifetime; in part, it may be, because the obscurity or perplexity of their directions can vex only posterity; moreover, they are less under the influence of discreet advisers. Hence dispositions by will produced much the greater part of the litigation which defined the bounds of legal control over future generations.

Complete freedom of dealing with land by will was a result of the abolition of military tenures, an event which preceded in time the settlement of the rule

[1] A gift by will of freehold land, or of such rights arising out of or connected with land as are by English law classed with it as *real property*, is called a *devise*. A gift by will of personal property (a term including leasehold as well as movable property) is called a *bequest*. Dispositions of real property of a kind not conforming to the rules of the common law before the Statute of Uses are called, when made by will, *executory devises*.

against perpetuities, and may be taken as marking the full close of the mediæval stage of the law. Though in form it stands as one of the first acts of the Restoration, in substance it was one of the many law reforms undertaken in the time of the Commonwealth. Most of those reforms were rejected or dropped at the Restoration. This one was too popular and necessary to be so dealt with; nor was unexceptionable authority wanting, for a similar measure had been strongly advocated by Coke.[1] The Act of the first Parliament of Charles II. for abolishing the military tenures and their incidents was passed in 1660. No notice was taken by it of the previous Act of the Commonwealth which had been passed in 1656, all statutes of the Commonwealth being treated under the restored monarchy as made without lawful authority, and mere nullities; but the same provisions were enacted in a rather more elaborate form.[2] All freehold tenures were reduced to the one type of "free and common socage,"[3] with an important twofold result. First, all the vexatious incidents of military tenure disappeared with the tenure itself; only ancient money rents might remain payable by the tenant, which already had become, by the changes in the value of money since they were fixed, almost or altogether nominal. Next, inasmuch as the statute of 1540 had enabled tenants in fee simple to dispose by will of the

[1] See the details and references in Mr. Digby's *History*, ch. ix. It is a great but not uncommon error to overlook these facts, and regard the legislation of 1660 as an arrangement between Charles II. and the great landowners.

[2] According to Madox (*Hist. Exch.* i. 620, ed. 1769), the workmanship of the statute leaves much to be desired.

[3] See pp. 57 and 60, above.

whole of their socage lands, and socage was now made the only freehold tenure, the whole of the fee-simple land in the kingdom became disposable by will. Feudal tenancy was converted for all practical purposes into full ownership. The "honorary services of grand serjeanty," that is, services due to the Sovereign in person by the terms of the tenure, were exempted from abolition; and tenure in frank almoign, by which the greater part of ecclesiastical lands were and still are held, was left untouched.[1]

It had been proposed at an earlier time to compensate the Crown for the loss of feudal dues by assessment of a fixed money rent on the enfranchised lands.[2] This method was not now adopted, but the excise duties which had been invented by the Long Parliament and renewed under the Commonwealth were granted to the King "to the intent and purpose that his Majesty, his heirs and successors may receive a full and ample recompense and satisfaction" for the feudal incidents, and for certain other profits and privileges abolished by the same Act. There is a not uncommon impression, I believe, that the land tax was imposed as part of, or in connection with, the same transaction, and to make up to the public revenue for the income formerly received from the military tenants of the Crown. But this is not so; we first hear of the land tax in 1692, and then as part of a scheme for a general property tax.[3] The land tax itself has now shrunk into relative insignificance beside

[1] This, however, was not a real exception, for every non-military free tenure is tenure in socage.

[2] Coke, 4 Inst. 202.

[3] Appendix I. to Mr. G. Brodrick's *English Land and English Landlords* (by Mr. Humphreys-Owen).

Schedule A of the Income tax, which in our time is the real and effective tax on landed property for national as distinct from local purposes. It is a true property tax, being, unlike the tax on profits under Schedule D, assessed on the gross, not on the net value. And if any one thinks land does not bear its fair share of taxation, and wants to raise the question in a practical form, his proper course would be to propose a differential rate under Schedule A. But it is easier, and for some purposes more profitable, to put forth sounding generalities than to work out a definite plan.

There were other branches of law relating to land which the development of the seventeenth and eighteenth centuries brought into substantially their present condition. Of these the law of mortgage is the most important. The power and practice of making a debtor's property, and especially immovable property, a security to the creditor for the payment of his debt, are wellnigh as old as the legal recognition and judicial enforcement of any rights of property whatever. The reflection is trite that both parties gain—the creditor by having security, the debtor because a secured creditor can let him have money on easier terms. Good security means low interest as certainly as high interest means bad security. Certain reformers who wish on economical grounds to abolish mortgage altogether must take, it seems to me, an extremely sanguine view of the facility of making a radical change in the convenience and the desires of mankind. The forms, however, in which English law has given effect to this all but universal practice have been singularly ill chosen. Beginning with fictitious and impracticable stringency, our practice has ended in a

wide and dangerous laxity, which breeds doubtful titles and litigation, and is no small encouragement to fraud. In the mediæval period we meet with two ways of giving land in security. One of these consists in handing over possession to the creditor, who repays himself out of the rents and profits. This is called in Latin *vivum vadium*, in French *vif gage*, because the pledge in the creditor's possession is, as it were, alive for the debtor's benefit in working off the debt. In English it is called a Welsh mortgage; in modern practice it seldom or never occurs. The other and prevailing method is a conditional sale of the land by the debtor to the creditor. If the debtor repays the money with interest to the creditor at a stated time, the creditor must give him back the land; if not, it remains the creditor's. And this is properly called *mortgage*, *mortuum vadium*, in opposition to the "vif gage" where the growing profits go to extinguish the debt, because the profits of the land are, as it were, dead to the debtor. It must be difficult for any one but a lawyer to believe that so clumsy an operation is to this day the regular means of securing a debt on land in England. It is true that its harsh meagreness was amplified by the judgments of the Court of Chancery into a full and elaborate system of rules, abounding even to overmuch caution in safeguards for the debtor. The terms of the transaction were—as they still appear to be—that the debtor must pay his money to get back the land (redeem it, in the technical phrase) at a stated time, generally six months after the date of the agreement, or it would become the creditor's absolute property. But the Chancellors laid down that, notwithstanding these terms, the debtor should be ad-

mitted to redeem after the set time had past. The right thus allowed him in the Court of Chancery was called an "equity of redemption." In other words, the jurisprudence of that Court, looking to the substance of the dealing between the parties and disregarding the form, treated the borrower as still the real owner of the land, and the land as only pledged for the lender's security. But a corresponding right had then to be given to the lender, his nominal right to deal with the land as owner being made useless. He might indeed take possession when the debtor failed to pay on the appointed day, but he did so at his peril; the Court held him strictly accountable to the debtor, so that the plight of a mortgagee in possession[1] is one of the most unenviable known to the law. Therefore a more just and convenient redress was given him. He was allowed, if he could not get payment of his debt after due notice, to sue in Chancery that the borrower might be ordered to pay the principal and all arrears of interest, or in default be "foreclosed of his equity of redemption," that is, no longer protected against the strict legal consequences of his agreement according to its form. This, however, was found expensive and tedious; and it became an almost universal practice to insert in the deed special provisions enabling the mortgagee to sell the land and repay himself out of the proceeds, if the debt were not paid off on notice, or if the interest fell into arrear for more than a certain time. Recently this "power of sale" has been conferred on mortgagees by Act of Parliament, so as to supersede in ordinary cases the necessity of expressly repeating the

[1] The borrower who pledges his land by way of mortgage is called a *mortgagor;* the lender who holds it in pledge is a *mortgagee.*

provisions which had become well settled by usage. Power has also been given to the Court to order a sale of the property instead of foreclosure. Shortly, the result is this:—A deed of mortgage means something very different from what it says, but this has so long been an understood thing that nobody is misled by it. The mortgagee never expects to be repaid on the day nominally appointed for redemption (not uncommonly, indeed, there is an express stipulation that the principal shall not be paid off till after a certain number of years), and the mortgagor's possession is safe as long as he pays the interest punctually.

But the Court of Chancery embarked on other adventures, and discovered new methods of encumbering land. It was not enough to remodel the old mortgage into accordance with present convenience and the real expectation of the parties. Nor was it enough to hold that a beneficial owner who had not the "legal estate" might raise money on the security of his beneficial interest in the same manner as a legal tenant. It was held, first, that an agreement to give a mortgage was not a mere personal agreement, but operated as a charge on the land itself in the hands of any one who knew of it; and then that an "equitable mortgage" might be created without any written agreement at all. The latter step came about thus:—As the first thing required of an English landowner by any one dealing with him for the land is to produce his title-deeds, the handing over of the title-deeds to a creditor, pending the preparation of a formal security, is a fairly effectual precaution for the creditor's safety. When the Court of Chancery took notice of this practice, it became, and it still is, the

established doctrine that such a deposit of deeds constitutes an "equitable mortgage" of itself. This doctrine being founded on the supposed equitableness of executing the agreement between the lender and borrower, and not on any virtue of the title-deeds in themselves, it does not matter whether the documents actually deposited are the whole of the debtor's evidence of title, and it even seems that it does not matter whether they are title-deeds at all, so long as they are stated so to be, and accepted as such by the creditor. A clever and unscrupulous borrower may thus deposit part of his title-deeds with one creditor, part with another, make an express agreement for security with a third (if he can lull the suspicion excited by the deeds not being forthcoming, a feat which, though not easy, has been performed with success), and execute a legal conveyance by way of mortgage to a fourth, while the value of the property on which they rely for payment is wholly insufficient to satisfy them all. The judicial adjustment of the conflicting claims thus created, and the determination of the order of preference to be given to the several creditors, demand the solution of most intricate legal problems. The Court of Chancery has manfully faced these difficulties, and, with the laudable intention of doing complete justice, has introduced various rules and distinctions which in their turn, being worked out in great detail, have led to unforeseen and sometimes unreasonable consequences. It may be doubted whether these refinements have not, on the whole, done more harm than good.

Endeavours have been made by Parliament at different times, from the end of the seventeenth century onwards,

to deter borrowers on landed security from committing fraud on lenders by the concealment of earlier charges. These, however, have been but moderately successful, and the present state of things is anything but satisfactory. Neither the Court of Chancery nor Parliament is much to blame. The power of encumbering land by secret and informal charges is but the natural outcome of the events which followed the Statute of Uses. When once the Statute of Enrolments was successfully evaded, and no fresh measure taken to restore the original purpose of the Statute of Uses, it was settled for many generations to come that dealings with land, instead of being, as the old law required, open and notorious, might be private and secret. The refinements and perplexities of "equitable mortgages" have only carried out this principle. And if the Legislature or the public are minded to have any effectual amendment, they must in turn consider whether there is any way short of wholly reversing the principles of modern conveyancing, and going back, in principle though not in form, to the ancient ways of the fathers of the Common Law.

CHAPTER VI.

LANDLORD AND TENANT.

A LANDHOLDER whose land is more than he can occupy and manage himself, and who does not choose to part with the ownership, can use it in the following ways:— He may, where slavery exists, cultivate the land by slave labour under overseers. He may cause it to be cultivated, still at his own risk and for his own profit, by the hired labour of free men under the management of an agent or bailiff. Or he may hand over the cultivation and the profits to some person who makes his own advantage of it on agreed terms and conditions, paying for the use of the land either in money or by a share of the produce. The first of these methods is not now possible in any considerable part of the civilised world, and has not existed in Europe at any time or place which need be regarded for our purpose. The second is everywhere possible in law, but it is seldom found convenient in practice. I do not think it is anywhere in common use;[1] in England, at any rate, a large owner who farms his own land is now met with only as an occasional exception. The third plan, namely letting the land to a tenant-farmer, has been, in one or another form,

[1] I am informed that Mecklenburg is an exception.

generally adopted in modern times. Yet another, which cannot be classed with any of these, was prevalent in the Middle Ages; that is, the holders of small tenements were bound by custom to do agricultural work, of stated amount and at stated seasons, on other land possessed for his own use by the lord under whom they held. These customary services may be called labour-rents; they probably represented what we now call the letting value of the land, but we must remember that they were not dealt with as a matter of contract. As often as not they were rendered by personally free men; in the case of a serf's holding the services were more burdensome and the tenure less assured, though a comparison of the mediæval text-writers with such detailed records as are accessible suggests that by those writers, and still more by the later ones who have built upon their statements, the precariousness of even the serf's tenure is exaggerated. As early as the thirteenth century these labour-dues were largely commuted into fixed money payments. In the latter half of the fourteenth century the depopulation and scarcity of labour following on the Black Death went far to break up the system, and by the beginning of the sixteenth century money rents appear to have fully taken the place of personal service. The same causes which made the old labour-rents worthless also made it unprofitable to the landlord to farm his own land by bailiffs, and thus the way was cleared for the modern usage of letting to tenants.[1]

[1] Archdeacon Hale's Introduction to *Domesday of St. Paul's*, p. lvi. Thorold Rogers' *History of Prices*. Much interesting and useful information on the social aspects of the history of tenancy in England is also to be found in Part I. of Mr. G. Brodrick's *English Land and English Landlords*.

Not that this usage is of modern origin. The beginning of it may be traced at least a century further back than the Norman Conquest. Religious foundations, the greatest owners of land in the earlier Middle Ages, and also the least able to give direct attention to its management, made temporary grants to tenants from an early time. Towards the end of the tenth century we find Oswald, Bishop of Worcester, explaining in a letter to King Edgar his practice of letting church lands to a tenant for three lives (the lives being the tenant's own, and those of two other persons named by him as successors) on the terms of rendering specified services; and several examples of these grants are preserved.[1] Two or three centuries later the practice of the Dean and Chapter of St. Paul's was to let their farms for life (sometimes to two tenants for the life of the survivor), the tenant rendering a fixed supply of provisions for the use of the house, with or without money payments in addition.[2] The farm buildings and live stock were found by the landlord, and the stock had to be accounted for at the end of the tenancy. The *métayer* system of farm-holding, still prevalent in many parts of the Continent, is not unlike this.

When tenancies for a fixed term of years came into use is not certain; they were well known, however, in the thirteenth century, and were common in the fifteenth. We may perhaps assume that letting for a certain term was suggested by the rotation of crops. A three years' lease,

[1] *Cod. Dipl.* No. 1287, and Introd. vol. 1, p. xxxiv. It does not appear whether the two succeeding lives must be those of persons in existence during the original tenant's life.

[2] *Domesday of St. Paul's*, xxxviii. 122 *sqq.*

according to the old-fashioned husbandry, would enable the tenant to complete the round and secure the advantage of the wheat crop: and a term of three years is in fact the shortest that occurs in practice. Yearly tenancy, now the commonest form of holding in England, is not a letting for the year but "from year to year," that is, for an indefinite time, determinable by either party giving notice (formerly a half-year's notice, but now a whole year's in the absence of agreement to the contrary)[1] at the proper season. Perpetual leases, after the fashion of the Roman emphyteusis, are unknown to English law, but there is no legal limit to the certain number of years for which a lease may be granted, and therefore no technical difficulty in the way of making it as good as perpetual. In practice twenty-one years is the greatest length of agricultural and occupation leases. Building leases are commonly made for ninety-nine years (but of late often for not more than eighty), and mining leases (which, as being in truth a sale of the minerals to be worked by the lessee, are in sundry ways peculiar) for terms varying with local usage, not as a rule exceeding sixty years. Longer terms, as of 200, 500, or even 1000 years, are conferred upon trustees as part of the machinery of family settlements, and were for some time commonly used in mortgages; it is enough here, if it be not too much, to mention their existence. In these cases there is no rent and no real tenancy. Leases for lives, renewable by custom on payment of a fine as often as a life fell in, were until lately the common method of managing ecclesiastical and corporate lands. The object of adopting this plan was simply to benefit the existing

[1] Agricultural Holdings (England) Act, 1883, s. 33.

bishop or corporators at the expense of the see, college, or other corporate body, the fines, as they were received for successive renewals, being treated not as capital, which they really were, but as revenue. Modern reforms have put an end to this, I believe, in every case.

Leaving exceptional cases aside, we pass on to consider the position of the tenant who holds either for a term of years, or as tenant from year to year. In the feudal plan of society there is no place for him; and accordingly the legal doctrine starts from the conception that the relation between the landlord and the tenant is simply a personal contract. This conception is at the bottom of all the differences between freehold and leasehold tenure, and, though largely qualified in its effects, must be borne in mind in order to understand even the most modern form of the law. The lessee's interest is now beyond question property, not the mere right to the performance of a contract. Still, being in legal theory the creature of contract, it has neither the dignities nor the burdens peculiar to freehold tenures. It is not the subject of feudal modes of conveyance, nor of the feudal rules of inheritance. No particular form of words is necessary for its creation; and the custom of creating it by deed has become a legal requirement (and that not in every case) only by modern statutes. It could always be disposed of by will if the tenant died before the expiration of the term; and in case of such death the law deals with it in the same way as cattle or money, and it goes to the executor, as part of the "personal estate," to be administered by the same rules as moveable property. If undisposed of by will, the leasehold tenant's interest belongs on his death to the same

persons, and in the same proportions, as cash or railway shares which he has not disposed of. There is no such thing as an heir of leaseholds. In one word, which for the lawyer includes all that has been said, a leasehold is not *real* but *personal* estate. From a strictly feudal point of view there is not an estate at all, only a personal claim against the freeholder to be allowed to occupy the land in accordance with the agreement. But as early as the thirteenth century two points were settled, which together constituted a true right of property in the tenant. If he was ejected in breach of his landlord's agreement, he could recover not merely compensation for being turned out, but the possession itself; and this not only against the original landlord, but against a purchaser from him. Already the purchaser could not say to the tenant whom he found on the land, "I have made no contract with you, look for your redress to the man with whom you did contract." The farmer's possession was as secure while his estate lasted as the freeholder's.[1] On the foundation thus laid the modern law has been completed, partly by judicial usage and partly by express legislation. Broadly speaking, both the landlord's and the tenant's successors in title enjoy, while the term of the tenancy lasts, the rights conferred at its creation upon the landlord and tenant respectively, and are subject to the burdens imposed on them. Exceptions may still occur, too rare and technical to be now further specified, which are just enough to show that the old notion of a mere personal agreement, though decayed, is not dead.

[1] "Non magis poterit aliquis firmarium eiicere de firma sua quam tenentem aliquem de libero tenemento suo."—Bracton, fo. 220 *b*: Digby, *Hist. Law of Real Property*, 126.

There is, however, one ancient and peculiar incident in the relation between landlord and tenant which the theory of contract is incapable of explaining. This is the landlord's right of distress. Early records, both of English customs and of those of kindred nations, point to a time when distress was almost the universal form of civil remedy. When cattle were the only moveable property of any value, and courts of justice had no swift or certain means of enforcing their orders, the most natural thing for a man to do who complained of wrong at his neighbour's hands was to drive off some of the neighbour's cattle, and keep them till the owner would either satisfy his claim or refer the matter to the decision of an impartial authority. Still more obvious is the form of self-help, preserved in our law to this day, which is called "distraint damage-feasant"; that is, impounding cattle which trespass upon one's land as a security that the damage shall be made good. When courts of justice began to compel the attendance of parties before them (for there are traces everywhere of a time when they professed only to do justice between such as willingly submitted themselves), they applied the same kind of compulsion that was in familiar use in private quarrels. As local jurisdiction passed into the hands of lords of manors, distress became the regular means of compelling persons subject to the lord's jurisdiction to appear in his court, and also, with or without judicial proceedings in the court, of enforcing payment or performance of the rents and services due from tenants. Some local customs even allowed the lord to seize the land itself. By steps of which nothing certain is known, it came to be understood that an agreement for the occupancy of land, though

it created no feudal tenure, and therefore no service in the proper sense, entitled the owner, if the rent fell into arrear, to seize any goods he could find on the land as a security for its payment. Probably the right was claimed and exercised without dispute by analogy to the rights of the lord of a manor against his freehold tenants. It may have contributed to the readier allowance, as it certainly does to the apparent justice of the proceeding, that in the Middle Ages the live stock of the farm were mostly supplied by the landlord. In such a case, if the tenant became insolvent, a landlord who seized the stock was only resuming his own. Be the early history what it may, the right has existed ever since English common law took a definite shape.[1] In the course of the last two centuries legislation has made it a far more efficient instrument in favour of the landlord; which has indeed been the tendency of all legislation concerning landlords and tenants until a pretty recent time.

By the common law things taken in distress were a mere pledge for payment of the rent. Therefore nothing might be distrained which could not be restored in the same condition, such as corn in sheaves; nor anything which grew out of or was fixed to the soil, such as standing corn; and the landlord had no power

[1] The student may consult, besides Sir H. Maine's chapter on the Primitive Forms of Legal Remedies, the chapter on Distraint in Mr. Bigelow's *History of Procedure in England*. For the common law in its settled form, see Blackstone, book III. ch. i. I cannot agree with Mr. Bigelow's argument that extra-judicial distraint was an innovation. Prohibitions in early laws, such as Cnut II. 19, even if of general application (which I doubt), really go to show that the practice was always common.

to sell distrained beasts or goods, nor to deal with them in any way as owner, even for the owner's benefit, except, perhaps, in case of evident necessity.[1] And, moreover, as Blackstone tells us, "the many particulars which attend the taking of a distress used formerly to make it a hazardous kind of proceeding; for, if any one irregularity was committed, it vitiated the whole," and the person distraining became a mere trespasser. This has already been noticed by Sir Henry Maine as evidence of the archaic nature of the institution. "The excessive technicality of ancient law" clings to all ancient customary remedies unless and until, as in this case, modern legislators remove it for the benefit of the parties, or one of them. In 1689 the power of selling things taken by distress, after notice to the tenant, was first given to the landlord by Act of Parliament; it was further secured and defined by subsequent statutes of the eighteenth century, and the old restrictions on the kinds of things liable to distress were greatly relaxed. "The summary power of sale now exercised has been created by the recent statute law with more attention to the profit of the rich than to the rights which were secured to the poor by our ancient jurisprudence."[2]

It will be understood that the right of the landlord is other and greater than the tenant could give him by

[1] It has been said that he had no right to milk a cow. The learned reader may compare the somewhat similar proposition that milking the testator's cow will make a man executor *de son tort*. But the statement is only in Rolle's Abridgment, i. 673, and is directly contradicted by the report of the same case in Cro. Jac. 147, where things done of necessity and for the owner's benefit are excepted from the general rule.

[2] Palgrave, *English Commonwealth*, i. 182.

contract: it is to take chattels found on the holding, whether the tenant's property or not. This, if it were simply a matter of agreement, the tenant could of course not enable the landlord to do: contracts cannot impose liabilities on persons who are not parties. In the case of under-tenancies, a thing unknown when the rule of law was fixed, great hardship may be the result, since the goods of a sub-tenant may be distrained for rent due from his immediate lessor to the superior landlord. This "great loss and injustice" (in the words adopted by Parliament) was remedied in the case of lodgers by an Act passed as lately as 1871. The expediency of the right of distress as regards farm holdings has in recent years been much discussed. It is rational to say that, since the landlord cannot help giving credit, he ought to be in some shape and to some extent a preferred creditor: but the existing law of distress gives effect to this principle in the most rough and irrational fashion. It would seem that the advocates of complete "freedom of contract" in the relations between landlord and tenant ought to have been the first to demand the abolition of an anomalous customary privilege which contract could never have engendered; but such was by no means the case. By the Agricultural Holdings Act of last session (46 & 47 Vict. c. 61) the landlord's right to distrain, which at common law extended to six years' back rent, is limited to one year as regards holdings within the Act, that is, farm, pasture, and market garden lands: and hired machinery, and live stock not being the tenant's own property, are exempt from distress, the former absolutely, the latter with certain qualifications.

It may be regarded as a kind of set-off to the power

of distress that other summary powers and remedies which lessors are in the habit of securing to themselves by contract have lately been mitigated in their operation, so as to prevent them from being abused beyond their true function of securing the landlord's interest. For a long time it has been the common practice to insert in leases, especially of town property, provisions enabling the landlord to re-enter and put an end to the lease if the tenant fails to perform his obligations. Non-payment of rent is the cause most commonly specified; another is neglect to keep the premises insured, where the tenant has covenanted to insure; frequently the clause of re-entry extends to breach or neglect of any one of the tenant's covenants.[1] With regard to non-payment of rent, the tenant became entitled, first by the practice of the Court of Chancery, and then by modern Acts of Parliament, to be relieved from forfeiting the lease on payment of the rent in arrear and costs. About twenty years ago neglect to insure was also made remissible on certain conditions. And now by the Conveyancing Act of 1881 (sec. 14) the Court has power to grant relief to the tenant in its discretion, and on such terms as it thinks fit, except in the case of non-payment of rent, as to which the former Acts remain in force.

Another general rule of law which bore hardly on tenants has gradually been relaxed in their favour, namely, that which declares that things affixed to the soil become for legal purposes part of it, and cease to be the tenant's. The truth is, and it may as well be

[1] Covenant, which etymologically is a mere synonym of agreement, signifies in English law any promise made by deed.

stated at this point, that the law of landlord and tenant has never, at least under any usual conditions, been a law of free contract. It is a law of contract partly express, partly supplied by judicial interpretation, and partly controlled by legislation and sometimes by local custom. So far as the terms and conditions are express, they are in the vast majority of cases framed by landlords or their advisers. The tendency of judicial interpretation has also been, until lately, to incline the scale of presumption in favour of the landlord on doubtful points; and the same may be said of the ruling tendency of legislation down to the middle of the present century. The allowance of local customs, which might have done much to redress the balance if taken up betimes, depends on the tendency of the judges. When special customs were looked on as a kind of natural enemies of the common law, and strict proof of them was required, they got little help in court. Probably many tenants have in past times failed to establish customary rights, or have been discouraged by the failure of others from asserting them, in cases where the decision would now be the other way.[1] As to the point now in hand, it was settled early in the eighteenth century that a tenant might at any time before the end of his term remove fixtures set up by him for purposes of trade. Early in the present century the judges, with unfortunate timidity, declined to extend the same principle to build-

[1] A good example of the present tendency to give full effect to established local usage is afforded by the case of Tucker *v.* Linger, decided by the Court of Appeal in the spring of 1882 and this year affirmed by the House of Lords.

ings and fixtures provided by a tenant-farmer for purely agricultural use. What they did not see their way to declaring as common law has at length by successive steps been enacted by Parliament. By an Act of 1851 a tenant who, with the landlord's consent in writing, put up farm buildings or machinery at his own cost, was enabled to remove them as his own property, subject to an option on the landlord's part to take them at a valuation. The Agricultural Holdings Act of 1875 extended this right of the tenant (with some small variations of language in his favour) to engines, machinery, and fixtures affixed to the holding even without the landlord's consent, saving, however, to the landlord a right to object to the erection of a steam-engine: lastly, the Agricultural Holdings (England) Act, 1883, has re-enacted this provision without the saving.[1]

There remains a serious economical question between landlords and tenants, for which the common law failed to provide a solution. No general rule of law gives an outgoing tenant any compensation for permanent or unexhausted improvements made by him. A tenant who has a pretty long lease may no doubt so order matters as to get the full benefit of his improvements; though even so it is the worse for the land to make it the tenant's interest to leave nothing in it. But in England yearly tenancy is the rule, and leases for fixed terms the exception. In some parts of the country local customs exist which are found fairly satisfactory, providing a scale of compensation for the tenant's outlay on lime, artificial manures, artificial feeding stuffs, and the like. But these are of limited extent, and applicable,

[1] S. 34.

as a rule, only to the soils and agricultural usages of the particular districts where they prevail. Several plans have been put forward at various times, partly in literary discussion, partly by means of Bills introduced in Parliament. In 1875 the Ministers of the day brought in and carried a measure entitled "The Agricultural Holdings Act, 1875." This provided a graduated scale of compensation according to the character of the tenant's improvements, with such checks and safeguards as were thought proper to secure the landlord from reckless enterprises, and from being, as the common phrase goes, improved out of his property. But landlords and tenants were left free to make agreements excluding the operation of the Act if they thought fit. In fact its framers did not so much alter the law as devise a statutory model form of agreement for compensation which parties might accept or not at their choice. It was hoped, apparently, that the Act would be generally accepted. But, whether because landlords did not choose to have their legal powers abated, and were able to impose their will on their tenants, or because both landlords and farmers preferred their familiar local customs (even where usage had not obtained legal sanction from the courts), or partly from the one cause and partly from the other, it so happened that almost everywhere agreements excluding the Act were made on the renewal of current tenancies.[1] Thus it became evident that more decisive handling of the matter was required; and the constant trouble and

[1] "With a very few exceptions, the whole body of English landlords have negatived its application to their own estates."—G. Brodrick, *English Land and English Landlords*, p. 209.

agitation of the Irish land question (the direct consideration of which is expressly excluded from the scope of this work) have doubtless had something to do with keeping the English tenant-farmer's claims before the public. He might very fairly say, and in effect it was said on his behalf: "You have devoted whole sessions to devising heroic remedies for the relations of landlord and tenant in Ireland. Here am I, waiting your leisure with my business, not wanting heroic remedies at all, but only just and moderate satisfaction of demands which you have already allowed to be just in principle. If you will not do me right, you are discouraging lawful and sober men, and putting a premium on violence."

Two principles have been advocated for the securing of compensation to an outgoing tenant. One is to assess the value to be set on his improvements, defined according to their kind, by more or less specific rules, and with the general understanding that the measure of value is what the improvement is worth to an incoming tenant. This is the principle on which prominent owners and occupiers of land of both the great political parties have framed their schemes, and which was adopted by Ministers in the Bill introduced by them in the present year, which has become law with all but general assent, and some of whose provisions on other points have already been mentioned. The other principle is that of ascertaining the value by actual competition, in other words, creating a saleable tenant-right. This has been vigorously urged by its supporters, and was embodied in a Bill prepared on behalf of a body styled "The Farmers' Alliance"; nevertheless it has gained but little acceptance in the

country or Parliament, and for the present at least it appears to be out of court.

The Agricultural Holdings Act of 1883, which takes effect on the 1st of January 1884, superseding and repealing the Act of 1875, is somewhat clumsy in form, and bears in every part, after the manner of all English legislation involving a conflict of interests, the marks of compromise and abundant caution. It establishes, however, in opposition to the old common law, the leading principle that an outgoing tenant who has improved the holding is entitled to get by way of compensation "such sum as fairly represents the value of the improvement to an incoming tenant." The improvements for which compensation may be obtained are, it is true, defined and classified with excessive minuteness; and the previous consent of the landlord to permanent improvements (such as building, irrigation, planting, and reclaiming) is a necessary condition of their being a subject of compensation. As to this class of improvements, therefore, the only effects of the Act are to make the landlord's consent, if given, binding on the land and on his successors (which however is important, having regard to the great amount of land in settlement, or in the hands of trustees or public bodies or officers with limited powers), and to throw on the landlord the burden and odium of refusing consent where the improvement is clearly a proper one. Perhaps it was impossible to go further consistently with the fundamental assumption of English leasehold tenure, that the lessor is entitled to have back his land at the end of the term in the same condition in which the lessee took it. As to drainage, a middle course is observed: the tenant need not obtain the

landlord's consent for draining the land, but he must give him notice of the intended work, and then the landlord may do it himself if he thinks fit, and charge the tenant with an addition to his rent by way of interest. Exhaustible improvements, such as liming and manuring, may be made, and will entitle the tenant to compensation, without the landlord's consent. Claims for compensation are to be settled by reference; the local county court may appoint a referee or umpire, as the case may require, in default of either of the parties or their referees acting, or either party may call for the nomination of an umpire by the Land Commissioners. The Act contains, moreover, a number of minor provisions and safeguards for which the text itself must be consulted. It seems, on the whole, fitted to carry out its objects with as little friction and waste of power as, our system of legislation being what it is, can fairly be expected.[1] But it remains a misfortune that the principle of compensation now declared by the Act was not in the first instance adopted by the common law. Local usage and a certain amount of judicial decision would then have settled the method and details of the tenant's compensation much better than the clauses and schedules of a modern Act of Parliament can do it. We are no longer able to declare a broad principle and leave it to work itself out; we expect every question of detail to be met beforehand, and entangle ourselves in intolerable minuteness without, after all, being secure against material oversights. And we shall hardly escape or mitigate this

[1] I do not think that leases or agreements can be so framed as to evade the Act with success. Attempts, however, will not improbably be made.

evil until either we greatly extend the modern device of delegating legislative powers, or in some way return to the older fashion of legislating by way of general instructions and conferring a large discretion on the executive authority. This, however, belongs to the problems of the general theory of legislation.

Except as regards the special legislation for agricultural tenancies which has just been noticed, and which dates only from the middle of the present century, there is no difference in law between urban and agricultural leaseholds. But in practice and custom the difference is very great. Farm holdings are always or almost always taken by the tenant direct from the freeholder, and there is generally something of a personal relation between them beyond the mere receipt and payment of rent. The farmer is legally bound to pay the full amount of his agreed rent, without regard to the goodness or badness of the season; but in bad years it is a very common practice for the landlord to remit such a percentage of the rent as to leave the tenant answerable only for so much as the farm seems fairly capable of paying under the circumstances. A great landlord who refused to follow this practice would be entirely within his legal rights, but would certainly be thought the worse of in the country. The landlord in return expects a certain amount of deference and compliance in various matters from his tenant. Not only does the farmer meet him half way on questions of shooting rights, and allow free passage to the hunt, but his political support of the landlord is not unfrequently reckoned on with as much confidence as the performance of the covenants and conditions of the tenancy itself. In the case of

holdings from year to year it may be not unfairly said that being of the landlord's political party is often a tacit condition of the tenancy.

In the letting of buildings for occupation, whether for business or as dwelling-houses, and especially in large towns, there is nothing of this kind. The transaction and the relations of the parties are purely a matter of commerce. The owner of land on which there stands a shop or a factory sells the right to occupy it to the shopkeeper or manufacturer just as he in turn sells his goods, that is, for the highest price he can get. And the same rule holds as to leases of mines and collieries, where the sale is not merely of the right to use the land, but of a portion of the land itself, namely, the coal, ores, or other minerals to be worked by the lessee. As regards occupation leases, again, underletting, instead of being the exception, is the rule. The freeholder of building land in or near a town makes a lease of it to a builder for a term, which used to be of ninety-nine years, but is now (at least in and about London) commonly not more than eighty. The builder undertakes to cover the ground with a house or number of houses, according to requirements laid down by the landlord in more or less detail. At the end of the term the buildings become the landlord's property, the lessee finding his compensation in such profit as he can make of them during the term by subletting to occupying tenants. In houses of a good class, which are occupied as a whole, there is commonly only one underletting. But there may be more; and in the case of smaller tenements the actual dweller often has to pay several intermediate profits, getting in return bad quarters and a precarious tenure. The system

of building leases is convenient for the freeholder, as it saves him all trouble beyond that of laying out the plan or the general character of the buildings to be put on the land, and ensures him the possession of his property greatly increased in value at the end of the term. He might build himself and let direct to occupiers, thus getting the full profit at once, but he would then incur also the trouble and risk which by the usual arrangement are thrown on the first lessee, commonly known as the "speculative builder." For all other parties, and it would seem for the public, the plan is a thoroughly bad one. As the builder has no permanent interest in his work, he has no motive for making it durable, and is tempted to make it, on the contrary, as bad as the ground landlord's surveyor can be induced to pass, and occupying tenants to accept for their habitation. He buys the use of the land from the freeholder for a limited time, and retails it to the public. All the risks of the retail market fall on him; some time must elapse at best before he can make a profit, for it takes time, even with hurried and flimsy work, to build houses and make them look fit to live in. There is no business in which profits are more uncertain, and none, I believe, in which there is more insolvency; on the other hand, great fortunes have been made by well-known builders in London and elsewhere. When the building lessee's turn comes, it is of course his interest to make the most he can out of the under-tenant for the time allowed him. Dwelling-houses, therefore, are necessarily rack-rented.[1]

[1] Rack-rent, I need hardly explain, is the highest annual rent that can be obtained by the competition of those who desire to become tenants. It is not a strictly legal term, though sometimes

By well-to-do sorts of people this is perhaps not felt as a grave inconvenience, but the pressure and hardship on the smaller under-tenants are very great.

It is evidently absurd to speak of freedom of contract in relation to such a system. Desirable building ground near towns, and still more the ground of towns and cities already long occupied, and eminently those districts and sites which are favoured by business or fashion, are a monopoly in the hands of the landowner. The landowner dictates his terms to the building lessee, who in turn dictates them to the occupier, making the occupier's obligations, for his own protection, exactly follow those of the original lease. In this way the population of whole cities may be said to live at the will of a few great landlords. Over whole square miles of what is commonly called London the Duke of Westminster or the Duke of Bedford may without appeal or control forbid any given kind of building to exist, or any given kind of business to be carried on. In the eye of the law the Westminster, or Bedford, or Portman estate is simply so much land in the county of Middlesex, which the freeholder need not have built upon, or allowed others to build upon, unless he chose. If he does not choose to sell, and chooses to grant building leases, it is for people to take or leave,—as, where it is difficult to find a tenant for a farm in depressed times, it may be for the landlord to take or leave the tenant. Accidents of site and social conditions may give the freeholder a supreme monopoly, but that is his good fortune, an extraneous matter with which the law does

used in Acts of Parliament; in legal documents it is represented by "the best rent that can be obtained without a fine."

not concern itself. That such powers are used, on the whole, with so little ground for complaint as they are, is much to the credit of human nature and of the training of English gentlemen. But the matter involves more than one serious problem for the next generation, if not for our own. The value of land for occupation in towns has increased out of all proportion to the increase in the value of other land; it is comparatively little affected by the depression of agricultural industry, and no reason appears why the increase should not continue. This affords another potent reason why the fortunate owners of city ground-rents should go on leasing rather than selling; for to sell the freehold of such ground as the bounds of the city of London encompass is to part—however great be the price in hand—with potential riches beyond all present valuation. We are in sight of an accumulation of wealth and power in a few hands, and concentrated on vital parts of the commonwealth, such as is without example in history, and might conceivably be a danger to the State. But it is far more easy to perceive the danger than to devise a remedy. In Scotland the practice is to grant the land in perpetuity for a fixed rent (which under the feudal rules of Scottish law is easily done by a form of conveyance called in modern practice a "feu-contract"); building leases of the English type are, I believe, unknown. In the north of England it is not uncommon to do what comes nearly to the same thing in a less direct form by conveying the land in fee-simple and taking an annual payment out of it under the name of rent-charge.[1]

[1] Since the statute of *Quia Emptores* (p. 69 above) a rent proper cannot be reserved upon a grant in fee-simple except by the Crown. There was never any corresponding enactment in Scotland.

But this is anything but satisfactory, for every part of the land is liable for the whole rent: therefore, if the subject-matter of the original grant is subdivided among other purchasers (which constantly happens), the occupying owner will find himself under liabilities which are uncertain and in possible events may be ruinous. Leases for a very long term, such as 999 years, have sometimes been used for the same object, and are open to the same inconvenience. In other parts of the north country the land is sold off in plots to builders who become absolute owners; the simplest plan of all, and, if the parties will use it, the most rational.

It has been proposed to confer on lessees of house and cottage property the power of acquiring the freehold by way of compulsory purchase, or, to put it in a neater and perhaps more easily understood form, to attach a statutory option of purchase to all leases of a certain length. The terms would have to be in each case settled either by arbitration or by some kind of judicial process if the parties could not agree; the reference clauses of the Agricultural Holdings Act might serve for the first lines of a working plan. The first effect of such a law would probably be to check the supply of building land and dwelling-houses by making landowners unwilling to grant new leases, and thus to aggravate for the time the evils of monopoly. What would be the ulterior effects it is not easy to foretell. It seems doubtful whether the acquisition of permanent interests by the people most in want of them would really be much facilitated. And it does not seem clear that building lessees are now, as a rule, anxious to acquire the freehold: for if they were so, they could

and would find opportunities even under the present system. Urban freeholders are not often willing to sell, but forced sales are every now and then brought about by various causes. Still, it is something to recognise that a problem has to be faced. The idea of "leasehold enfranchisement" has at least such elements of a solution as to deserve consideration, and in one or two parts of the country it is attracting serious attention. No legal difficulty that I am aware of presents itself, beyond the trouble of working out the apportionment of purchase-money where the freehold is in settlement. The question, therefore, is an economical, not a legal one. The argument that the proposal violates the rights of property and contract will doubtless be urged against it whenever the time for practical discussion arrives. But I cannot help observing that, for reasons which have in part been indicated, such an argument appears in this case to be entitled to very little weight indeed.

It seems fit to be weighed, however, whether any systematic reform of urban tenure should not aim at making the municipalities rather than individual occupiers the ultimate owners. One or two of our northern cities, by using such occasions as presented themselves from time to time of acquiring property within their own borders, have already made some way in this direction.

CHAPTER VII.

MODERN REFORMS AND PROSPECTS.

FOR about a century and a half there was no material change in the English law of real property. There was, indeed, in the early part of the eighteenth century a period of minor reforms, which are at this day perhaps not sufficiently remembered. The mechanism of judicial and other proceedings was in some respects simplified, and some opportunities of fraud still afforded by obsolete doctrines were removed. But the work of the preceding century was in the main left untouched. The statute which abolished the military tenures marks the end of one period of transformation. The Act for the Abolition of Fines and Recoveries passed by the first reformed Parliament marks the beginning of another which is still in progress. As a help to memory, the Restoration and the Reform Act of 1832 may well be thus taken as the landmarks, although the current form of settlement of landed property was not fully worked out until towards the middle of the eighteenth century, and on the other hand the movement leading to the series of legal reforms now to be spoken of was formally begun, by the appointment of a commission of inquiry, some years before it bore fruit, and was in substance due in great

measure to the labours of Bentham. And Bentham's criticism was in turn provoked and made possible by Blackstone's artistic exposition of the settled form of the law which in his own time was still recent. So it is everywhere, both in nature and in the affairs of man; what seems to be repose is in truth the preparation of change.

It will be convenient to take the modern alterations of the law not in order of time, which would lead to great intricacy and to the confusion of distinct topics, but according to the subject-matter. And first we will take the formal simplification of dealings with land. From the latter part of the sixteenth century onwards the common mode of conveying freehold land, as we have seen, was by the ingeniously artificial process of "lease and release" (p. 101 above), which involved the bulk and expense of two deeds. The length of these documents also steadily increased until about the beginning of the present century; partly by reason of the greater complication of the affairs and interests to be dealt with, and the new precautions devised by lawyers to meet newly-discovered dangers to titles, partly because, by an evil usage which has only in the last year or two been abated, professional skill was recompensed merely in proportion to the amount of writing produced. In 1845 (after one or two rather clumsy experiments, which it is needless to specify) the first of these troubles was removed in a manner so simple and elegant as to command the approval of even the conservative school of conveyancers. The ceremony of feoffment was always inapplicable to an estate in reversion or remainder. Livery of seisin—the formal transfer of possession which has been described elsewhere—could be given only by

one who had the actual possession to one who had it not. A freeholder not having the right of actual possession (as where the land was held by a tenant for life or a lessee) disposed of his interest by deed without other ceremony. The same rule applied to such rights over the lands of others, rent-charges, rights of way or common, and the like, as were capable of disposition and transfer. All rights and interests that could be so dealt with were said to "lie in grant." The Act to amend the Law of Real Property passed in 1845 extended this rule to estates in possession.[1] Since it took effect everything which can be done by feoffment, bargain and sale enrolled, or lease and release, can be equally well done by a simple deed; and although the older forms of conveyance are still open to any one who might choose to make use of them, the readier way provided by this Act has been almost universally followed. Certain further simplifications as to the use of particular words (not all of them really new) have been introduced by the Conveyancing Act of 1881. They are too technical to be dwelt on here; only it is worth notice that they do not touch the substance of the old feudal rule—namely, that a grant to a man without specifying what interest he is to have will give him no more than an estate for life.[2]

[1] "After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."—8 & 9 Vict. c. 106, s. 6. The capacity which a feoffment formerly had of practically giving a purchaser a better title than his vendor's (p. 77 above) was abolished by the same statute.

[2] 44 & 45 Vict. c. 41, s. 49, etc. These provisions have already given rise, I believe, to a popular error that the use of the

As to the other point of the prolixity of deeds, much more was left for the Conveyancing Act to do. In the same year (1845), and I suppose under the same auspices as the Act to amend the Law of Real Property, a statute was made with the laudable intention of substituting short forms for the accustomed verbose ones. It was a complete failure, partly from defects of workmanship, which made it positively misleading, but chiefly because no legal practitioner who adopted it would, under the vicious scheme of remuneration then in use, have been tolerably paid for his work. The abbreviated forms provided by the statute were seldom or never used, and for another generation deeds went on being framed as before, though the practice of the best conveyancers was now to study conciseness. At last, in 1881, after much discussion both official and unofficial, a new Act ("The Conveyancing and Law of Property Act, 1881") dealt with the form of deeds relating to land in a far more thorough-going and elaborate manner. The use of a few prescribed words will now incorporate in a deed, according to the nature of the case, one or other of the several accustomed clauses which were formerly inserted at full length; and in ordinary straightforward cases this may conveniently and safely be done. At the same time another Act (the Solicitors' Remuneration Act) abolished the necessity or supposed necessity of paying for the preparation of deeds according to length, and thus left the way clear for the Conveyancing Act. This last, however, is not compulsory; people may go on using the old forms as much as they please,

word *grant* is not only unnecessary but improper, whereas it remains as proper as ever.

but the new provisions have already, I believe, been pretty generally adopted. A supplementary Act was passed in 1882, but the points it deals with (as well as many of those covered by the Act of 1881) are too technical to be specified in this work. The credit of these measures belongs to both parties in the State; they were substantially prepared under the direction of Lord Cairns in the later years of the Conservative Ministry which held office from 1874 to 1880, and were taken up and passed into law with little alteration by the present Government. The same may be said concerning the Settled Land Act, of which we have to speak later.

The cumbrous machinery of fines and common recoveries (which has been described in Chapter IV.) was swept away in 1833, and a tenant in tail is now empowered, by means of a deed enrolled in Chancery, to make either himself, or any one to whom he wishes to dispose of his estate, a tenant in fee-simple. If he is in possession of the freehold, he can generally do this without any other person's consent. If he is not in possession, he must, as a rule, have the consent of the "protector of the settlement," who is commonly the tenant for life, otherwise he can create no greater estate than a *base fee* (p. 108 above). The name and function of the "protector" were introduced by the Act of 1833; but the purpose and the effect of the Act were, while simplifying the necessary proceedings, to preserve intact in substance the law and practice of family settlements. Considered as an improvement in form, which is all it professed to be, the Act for the Abolition of Fines and Recoveries has been of great service, and has worked with singular freedom

from difficulties of any kind. This success is due in some measure to the circumstance (not so common, unhappily, that notice of it should be superfluous) that the framing of the Act was entrusted to a man who thoroughly understood the matter he was to deal with.

It seems worth while to quote a few sentences from the First Report of the Real Property Commissioners to show how the problems of law reform presented themselves half a century ago to learned and enlightened persons. It will be seen that the limitation of their proposals was the result not of opposition or compromise but of free and deliberate conviction.

"The owner of the soil is, we think, vested with exactly the dominion and power of disposition over it required for the public good, and landed property in England is admirably made to answer all the purposes to which it is applicable.

"Settlements bestow on the present possessor of an estate the benefits of ownership, and secure the property to his posterity. The existing rule respecting perpetuities has happily hit the medium between the strict entails which prevail in the northern part of the Island,[1] and by which the property entailed is for ever abstracted from commerce, and the total prohibition of substitutions and the excessive restriction of the power of devising established in some countries on the Continent of Europe.[2] In England families are preserved, and pur-

[1] It was then possible to create inviolable entails in Scotland; the law has since been changed, and alienation is as easy as in England.

[2] Meaning probably those which adopted or imitated the Code Napoléon.

chasers always find a supply of land in the market. A testamentary power is given, which stimulates industry and encourages accumulation; and while capricious limitations are restrained, property is allowed to be moulded according to the circumstances and wants of every family."

Thus the Commissioners in 1829.[1] Lord St. Leonards would have been in their eyes a rash innovator, and Lord Cairns a revolutionist. But we are anticipating.

Another point where simplification was urgently called for, and was carried out a few years later, was the disposal of land (as well as of other property) by will. The state of things before 1838 (brought about by steps which we need not consider) was that the formalities required for a will of lands were excessive, those for a will of leaseholds or moveables absurdly and dangerously defective. There were also peculiar rules and exceptions (partly by common law, partly by custom, and partly by statute) in particular cases, and, on the whole, it was found on careful inquiry that there were ten different laws for regulating the execution of wills under different circumstances.[2] An Act of 1837, which applies to all wills made since the end of that year, abolished all these intricacies, together with many other inconveniences and doubts, and established the uniform rule that a will must be signed by the maker of it, and attested by two witnesses. It also applied to wills the rule—still not applicable to deeds—that a simple and unqualified gift is to be taken as disposing of the giver's whole interest.

[1] First Report, p. 6.

[2] Fourth Report of Real Property Commissioners, p. 12.

It is not the length of deeds, however, nor any formality required for either deeds or wills, that is the real source of expense and trouble in dealing with English land. The peculiar system of private conveyance which has grown up under the shadow of the Statute of Uses has made it needful for purchasers to secure themselves against the "constant danger from secret transfers and secret charges"[1] by an examination of the history of the property as evidenced by the title-deeds. Except in the rare cases where estates have been settled by Act of Parliament, undisturbed possession under a continuous title for a certain length of time is the only proof of the rightful ownership of land in this country. The title-deeds are the written history of the possession, and of the right in which it has been exercised; and from this point of view their contents are, or in strict prudence ought to be, examined by every purchaser. Almost always this operation requires some professional skill; often it requires much. In all but the simplest cases the process is a long and costly one. Not only solicitors and counsel have to be paid for their intellectual work, but a good deal of clerical and mechanical labour is involved in making and verifying copies or abstracts,[2] searching certain official records which might disclose matters affecting the title, and the like. All this falls

[1] First Report of Real Property Commissioners, p. 8.

[2] The digest of documents and facts laid before counsel as the basis of his opinion is called an "abstract of title." It is the solicitor's business to verify the contents of this, the counsel's to point out, if necessary, what further verification is required, and to advise whether, assuming the statements to be correct, they sufficiently show the vendor to be the rightful owner of what he offers to sell.

on the buyer, and in the case of small properties acts as an exorbitant tax added to the purchase-money; for the cost and difficulties are no less for a small property than for a large one. Indeed large properties are better off; for there are some estates of which the possession and title are historical, and so well known that, if a portion is to be sold or let, the owners can afford to make what terms they please as to dispensing with inquiry. Less fortunate sellers have to examine their own titles before going into the market, and to guard themselves against requisitions which it might be impossible or ruinous to comply with by selling only on carefully framed special terms, which are known, if the sale is by auction, as "conditions of sale." Very few landowners are in a position to make out their title if strict proof is required at every step, which it may be[1] in the absence of special conditions.

One need not dwell on the inconvenience of such a state of things in a great commercial country. It was amended in some particulars by an Act of 1874, which made some of the most usual special conditions part of the general law. The root of the evil, however, is untouched. Many times it has been proposed to establish an official registry either of deeds or of titles. The whole subject was elaborately considered by the Real Property Commissioners in 1830; they collected much information both at home and from abroad, and recommended the establishment of a general registry; but nothing was

[1] The practice of conveyancers is to be content in sundry matters with less than would be accepted as sufficient evidence in a court of justice; but even so the burden on the vendor under an "open contract" is a grievous one.

then done. Since that time the experiment of permissive registration of titles has twice been made, with next to no result. In 1862, in Lord Westbury's chancellorship, an office of land registry was established, and the offer of a State guaranty and great simplicity in future dealings was held out to owners who could satisfactorily prove their title. But the requirements of the initial proof were for most owners more formidable than the inconveniences of the existing system. Those inconveniences, moreover, fall chiefly and visibly not so much on existing owners as on those who buy from them; while every man can see the mischief of exposing his own title to a rigorous official scrutiny which may disclose an unsuspected flaw, and must invite his neighbours to raise questions of boundaries. It seemed the more prudent part to let sleeping lions alone. Solicitors, again, disliked the scheme, and gave it anything but encouragement; as with the attempt to shorten deeds, the matter was complicated by the problem of remuneration. In 1875 Lord Westbury's plan, being supposed to have failed through over-ambition, was supplanted by a more tentative and elastic one. But the office of land registry, as reconstituted by Lord Cairns' Land Transfer Act, still remains an office of sinecures. The inevitable weakness of every scheme of merely optional registration is that it is not the apparent interest of the landowner, save in exceptional cases,[1] to register. It is not found in practice that the selling price of land is sensibly diminished by its being sold under special conditions of the ordinary kind. In other words, what is called a

[1] As where contiguous lands acquired under different titles are to be thrown together, and sold or let in small parcels.

"marketable title," that is, a title such as the Court would compel a purchaser to accept upon an "open contract," is worth no more to the owner than a "good holding title," such as the vast majority of titles are. The temptation of acquiring a statutory "marketable title" is therefore spread in vain in the sight of English freeholders.

Practically the problem is unsolved. At least three distinct schools of opinion exist among competent persons, not counting those who are satisfied with things as they are. Some are for registration of title; some are for only keeping an official record of dealings with the land; others hold that nothing effectual can, or at any rate will be done until the substance of our land laws is greatly simplified; and perhaps these last are in the right.

Local registries of dealings with the land, not of title, were established in the last century in Middlesex and Yorkshire, and are still in use. Unfortunate decisions of the Court of Chancery have made these county registers far less efficient than they were intended to be, and it is hardly too much to say that at present their chief function (besides providing a livelihood for a certain number of officers and clerks) is to be a nuisance to conveyancers. Registration of assurances is well known in other English-speaking countries; it has long been in force in Ireland, in Scotland (where the system acts to a great extent as a registry of title also), and in several of the United States. Registration of title exists in most Continental countries, if not in all, and in our own Australian colonies. In England itself every manor has a register of the title to the copyhold

property held of it, namely the court rolls. But the law and the circumstances of English real property are so peculiar that the state of other lands in this respect is rather an object of envy than a presently practicable example for imitation. Neither can the archaic practice of copyhold tenure help us much. One thing seems tolerably clear; English landowners cannot both eat their cake in the form of secret conveyances, informal modes of raising money, and complicated settlements, and have their cake in the form of cheap and easy transfer of land. Either way has its advantages and its drawbacks, but we cannot follow both at once. The country must choose between them. Sir Henry Maine has lately pointed out that the establishment of a complete registry would tend to have considerable ulterior effects on legal doctrines and conceptions. The passage[1] should be read and considered by every one interested in the subject. Meanwhile, we remain in the condition very fairly described in one of the answers sent in to the Real Property Commissioners: "It is possible to attain to such a degree of certainty as commonly satisfies a prudent man in the ordinary business of life, but with considerable delay, difficulty, and expense; the great evil is not that titles are uncertain or unsafe, but that the investigation of them is difficult, tedious, and costly."

The acquisition and proof of title to land itself, and to rights over the land of others, have been put on a more rational footing by the Prescription Act of 1832, and the Real Property Limitation Acts of 1833 and 1874. Broadly stated, the results are as follows: Twelve years' possession of land (whether it begins with an ap-

[1] *Early Law and Custom*, pp. 351-361.

pearance of right, or by mere intrusion or "squatting") gives a good title as against claimants not disabled by infancy or the like from asserting their rights for themselves; and for the benefit of such persons or others claiming in their right, a further time of six years is allowed, counted from the removal of the disability or the death of the person subject to it; but in no case may the period open for the claims of persons out of possession be extended beyond thirty years in all. Rights over the land of others are established by twenty years' uninterrupted enjoyment if they are *easements* (that is, such rights as that of passage or of having free access of light and air, which do not involve taking anything from the land), thirty years if they are *profits*, that is, rights of taking something off the land, of which the most familiar case is a right of common. Possession is, of course, not available as a ground of title against a person whose superior title is acknowledged, by the payment of rent for instance, by the person in actual possession. This branch of the law, even with the modern improvements, is not an elementary one; and it will be understood that there are many special points and distinctions of which I do not profess to say anything here. It is a grave question, moreover, whether the establishment of titles by long possession is consistent with a complete and efficient system of registration. In Scotland, where there is such a system, there is nothing answering to our Statute of Limitation as regards land.

We come now to alterations more nearly touching the substance of the law. In 1833 the law of intestate succession was amended in various details. It does not

seem worth while to give a particular account of either the old or the new law. The death of a fee-simple holder of land without making a will is in modern times an exceptional case. Popular knowledge of the law of descent is confined to the fundamental rule that the eldest son (or his descendants as representing him) takes the whole of the land to the exclusion of younger children;[1] while daughters, on the contrary, share equally in the absence of sons. Nor is it often necessary for the practising lawyer to remember the farther rules of collateral succession. The prevalence of settlements, and the complete freedom of disposition by will that has existed since the Restoration, have caused this whole head of the law to shrink into comparative insignificance. Nevertheless, proposals have from time to time been made to change our unique law of inheritance as regards land by assimilating it to the law of succession of personal property, which is substantially the same as the Roman law in its final form and the present law of the rest of Europe. Throughout the States and colonies which took their law from England this change has already been generally made. At home these proposals have been strenuously resisted, and hitherto they have always failed. Why has a point of comparatively slight intrinsic importance been thus made a centre of active controversy? Simply because the point actually at issue is on both sides well understood to be the symbol of much more. The attack was in form directed upon a

[1] His title may be subject to the right of his father's widow to *dower*, *i.e.* to the enjoyment of one-third of the land for her life. But this right has become in various ways, which it would be too long to specify, practically obsolete in our time.

rather small anomaly; but in substance it was aimed at the privileges of landowners and the custom of settling lands from generation to generation on the eldest son. If the legal rule of primogeniture in the strict sense were abolished, the artificial primogeniture of our family settlements could not long survive it. Immoveable property would become assimilated to moveable both in law and in sentiment; or to speak more correctly, the change in the law would be an all but conclusive mark that public feeling was changed already. As it is, by far the greater number of the well-to-do people who make wills (I say well-to-do, because so much may fairly be inferred from a man sending his will to be settled by a conveyancing counsel) throw their land into a common stock with the rest of their property for equal division among their children. What is called "making an eldest son" is the exception. Sometimes the proposal to abolish the rule of primogeniture on intestacy, leaving intact the power of disposal by will in favour of the eldest son or any one else, is confounded with a proposal to introduce compulsory division of the whole or some considerable part of the heritage, according to the system which has always prevailed on the Continent. An error of such magnitude barely needs, one would think, to be pointed out. The two plans belong to different orders of legal institutions.

Copyhold lands have been incidentally mentioned in their historical aspect in former chapters. If I am right, they are the surviving relics of an antiquity to which the Norman Conquest is a thing of yesterday. But however venerable its antiquity, and however interesting to the student of historical jurisprudence the evidences

which it preserves, this tenure is found in many ways inconvenient in modern practice; nor is the advantage of copyhold titles being registered on the court rolls of the manor sufficient to outweigh the inconveniences. From imperfect identification of boundaries, and for other reasons, dealings with property of which part is freehold and part copyhold (a very common case) are apt to be exceedingly troublesome. The fines and other payments due from the tenant to the lord of the manor are mostly not a serious burden, but they may be so in exceptional cases. On the whole, the conversion of copyhold into freehold tenure, for which the proper word is enfranchisement, is generally felt to be desirable. It could always be done by agreement between the lord and the tenant; but the lord had to be willing, and the tenant as well as the lord under no disability, to say nothing of the possibility of disagreement as to the terms on which the lord's rights were to be extinguished. Under certain modern Acts of Parliament, of which the principal one was passed in 1852, enfranchisement is now compulsory on the requisition of either the lord or the tenant. Provision is made for valuing the manorial rights if the parties cannot agree. By the operation of these Acts copyhold tenure is gradually but surely disappearing.

If this form of ancient customary law is becoming obsolete, there is another branch of the same stock which, within the memory of the present generation, has been called into fresh life, and recovered much of its old importance: I speak of the law concerning rights of common. Such rights may be regarded as the remnant of the ancient communal system of holding and cultivating land. Being useless to modern agriculture, and inconvenient for the

larger landowners, they were long looked upon with disfavour by both the judges and the legislature, and were in a way to disappear even faster than copyhold tenure, but for the discovery that they were a valuable means of securing open spaces for public exercise and recreation. Two or three centuries ago, it is almost needless to say, there was no lack of open spaces even in London, nor any visible prospect of it. Wholesale inclosure, begun in more or less irregular ways in the sixteenth century, was the deliberate policy of the social reformers and philanthropists of the eighteenth. To bring as much land as possible under cultivation seemed to them the just ambition of the landowner who would serve the commonwealth. As long ago as the thirteenth century the statute of Merton had authorised the lords of manors to "approve,"[1] that is, inclose for their own profit, as much of the waste land as would leave enough uninclosed for the use of the commoners. Probably the

[1] "Approve" in this sense is not the common word = Lat. *approbare*, neither does it stand for *appropriare*, as has been conjectured with some plausibility. It represents an old French verb, *aproer* or *approuer*, to profit or enrich, from *preu* or *prou*, itself an obscure word, which in modern French survives in "ni prou ni peu" (cf. preux, prouesse). In Latin of the late thirteenth century (Statute of Westminster and Fleta) it appears in reflective construction as *se appruare*. "Se appruare de" . . . is therefore "to make one's profit of" . . . exactly what in the statute of Merton, where the word itself does not occur, is expressed by the phrase "commodum suum facere." The corresponding substantive is "approment" or "approwement" in the English of the fifteenth and sixteenth centuries. In the seventeenth century the spelling *approve*, *approvement*, and with it the mistaken derivation from *approbare*, came in. I am indebted to Dr. Murray, the editor of the forthcoming English Dictionary of the Philological Society, for the use of his materials and results on these two words.

statute only sanctioned an already prevalent usage, and it is doubtful whether the law declared by it was new.[1] Inclosures might also be made without limit if the consent of all persons entitled to rights of common was obtained; but this was seldom practicable. Many commons were inclosed under local Acts of Parliament, and by various old statutes inclosure for particular purposes, such as planting timber, was encouraged. In 1801 a general Inclosure Act was passed (superseded by a completer measure in 1845), and a standing commission was established to conduct and regulate the inclosure of common lands. The object of this policy was not merely to bring fresh land into cultivation, but also, and as regards the Act of 1845 chiefly,[2] to get rid of the old customs of cultivation by scattered parcels or shifting allotments in common fields. In 1845, however, there was already a kind of presentiment of coming change; for village greens were specially saved, and the inclosure of land near large towns was made subject to the consent of Parliament—a consent which some years later was made necessary in all cases. Provision was also made for the devotion of part of the land to public purposes. The Act, however, was still entitled "An Act to facilitate the inclosure and improvement of commons and lands held in common."

The reversal of the inclosing policy may be dated from 1865. Towards that time the rapid increase of building in the neighbourhood of London conferred a

[1] See Joshua Williams on *Rights of Common*, pp. 107,108; Elton on *Commons and Waste Lands*, 177-186.

[2] This appears from the proceedings of the Select Committee in 1844. Probably most of the earlier special Inclosure Acts had the same character.—Cp. Seebohm, *English Village Community*, p. 14.

new value on lands which had been worthless to the lords, and created a new danger to the people, who saw themselves being deprived of their playgrounds. The cause of the commoners became the cause of the public. Litigation ensued about various common lands, Hampstead Heath among others. In 1865 a Committee of the House of Commons considered the question of preserving open spaces near London, and the Commons Preservation Society was founded by private exertions. In the following year the Metropolitan Commons Act, 1866, put a stop to further inclosures within the metropolitan police district, and empowered the Inclosure Commissioners to prepare schemes for the management and regulation of the commons thus preserved. Some commons, Wimbledon for example, were separately dealt with by special Acts.

Meanwhile the movement for reviving and maintaining rights of common was extended into the country parts. At Berkhamstead an attempted encroachment on the lord's part was vigorously and successfully resisted. Mr. Augustus Smith, a tenant of the manor who fortunately had the means of doing right to himself and his fellows, sent down men by train early in the morning, who in a couple of hours demolished about a mile of wire fence erected by the then Earl Brownlow, taking care (as persons abating an unlawful obstruction or inclosure always should) to do no unnecessary damage to the materials. In the litigation that ensued Mr. Smith satisfied the Court of Chancery that his action was lawful, and obtained a decree against any repetition of the encroachment. A series of contests followed, in which the commoners were for the most part, though

not uniformly, victorious. In 1871 the rule was declared and acted on by Lord Hatherley, then Chancellor, that, where rights of common were shown to have been claimed and exercised for many years, it was the duty of the Court to find, if possible, an account of their origin which would justify them in law. Not that Lord Hatherley professed to lay down any new principle, but there can be no doubt that in fact he dealt with the case in a very different spirit from that of the judges of the Elizabethan age.[1] In 1874 the case of Epping Forest was taken up by the City of London. Here the peculiar and once oppressive rights of the Crown under the old forest law were made to play an unexpected part in restraining encroachments on the common. Owners and occupiers of land within a royal forest were subject by that law to various burdens and restrictions; thus they might not have fences above a height fitted to allow free passage to deer; and by way of compensation they were allowed rights of common, subject to the forest rules, over the whole waste of the forest without regard to the boundaries of particular manors. This was an insuperable bar to the lord of a small or decayed manor lawfully making himself absolute owner of the waste, as has not unfrequently been done elsewhere, by

[1] Warrick *v.* Queen's College, Oxford, L. R. 6 Ch. 716. In the recent case of Goodman *v.* Mayor of Saltash, 7 App. Ca. 633, a still further application of this principle was made by the House of Lords. The decision established a right (nominally for inhabitants of Saltash, practically for the public) to take oysters in the Tamar. I am disposed to think the reasoning by which it was arrived at may be found to support claims to rights over land also, which have hitherto been supposed incapable of legal existence; this, however, is too speculative a question to dwell upon here.

buying up the remaining rights of common. By a mere accident the Corporation of London were owners of a small property within the bounds of the Forest, and were thus entitled to undertake, as no private commoner could effectually have done, the research and expense necessary to establish their rights to the full extent. At the instance of the lords themselves, who thought they were choosing the lesser risk, measures were taken by Parliament for preserving the waste land not yet inclosed; but the lawsuit of 1874 (the course of which Parliament refused to stop) showed that many of the inclosures made within the previous twenty years, and untouched by the Act of Parliament, were unlawful. In the result a considerable amount of space (estimated at more than 2000 acres) was not only preserved but restored to the public.[1] Meanwhile the Parliamentary Commission proceeded with its work, and in 1878 a new Act of Parliament constituted the Corporation of London conservators of the Forest, with full powers of regulation and management, and with the charge of preserving it "uninclosed and unbuilt on, as an open space for the recreation and enjoyment of the public."[2]

In 1876 a general Commons Act was passed, which took the great step of establishing a presumption for

[1] See for further details the Report of the Commons Preservation Society, 1877, which is to be had for 6d.

[2] 41 & 42 Vict. c. ccxiii. Outstanding questions were by the same Act referred to the absolute arbitration of Sir A. Hobhouse. "All questions of importance in relation to the Forest are now settled, and the arbitrator has made his final award, specifying by a map the lands confided to the care of the Corporation of London, and dedicated to the public enjoyment for ever."—(Report of Commons Preservation Society, 1882.)

rural as well as suburban commons in favour of regulation rather than inclosure. Improvement is expressly defined so to include adding to the beauty of a common, a thing never dreamt of in the former Inclosure Acts. Special provision is made for giving facilities for recreation, and preserving objects of historical interest. In short, the Act, even where it leaves most to administrative discretion, is an emphatic instruction to the Inclosure Commissioners to reverse the policy of the earlier part of the century. Among other points which mark a new spirit, it makes encroachment on village greens a public nuisance. The general interest in these matters has continued to increase. Last year, after the trial of one representative case, steps were taken for the preservation of Ashdown Forest in Sussex by private arrangement. Even in the remotest and most open parts of the country vigilance is being shown against encroachment or defacement. Within the present year a local association has been formed for the preservation of Dartmoor; an object which (contrary to what might be supposed by any one who has not examined the state of things on the spot) can by no means be trusted to take care of itself.

A new form of encroachment has lately been found to require new vigilance. Railway companies and such like bodies are prone to put forth their hands on common rather than on inclosed land when there appears to be any choice, that they may have the less compensation to pay; and their managers naturally take little thought for preserving the beauty or the quietness of the country affected by their schemes. Within the last few sessions two or three projects of this kind have been signally discomfited in Parliament.

Important as the reaction against inclosure of open land may justly be thought, it has, on the whole, been effected through change in the spirit and working of the law rather than by changes in the law itself. One remarkable case of recent change remains to be noticed; a case where, after the law had repeatedly been declared by persons speaking with authority to be perfect and in no need of reform, a large measure of reform, designed by the greatest lawyer of the Conservative party, has now been accepted almost without a whisper of opposition. We have seen what grievous dislike was incurred by strict settlements of land when they were a novelty. Coke and Bacon, opponents in most things, agreed in denouncing them. Pamphleteers wished "that there might be no estate but absolute, for life or inheritance, without conditions or entails . . . and this would shorten all suits about estates."[1] Until the close of the seventeenth century the judges followed the Chancellor's allowance of the new-fashioned dispositions with undisguised reluctance. But when once the rule against perpetuities was fixed, the landowners and conveyancers had things all their own way for some generations. The scheme of settlement devised by certain ingenious counsellors of the Restoration passed, in the esteem of landowners and even of lawyers, into the category of things immemorial and sacred, bulwarks of Church and State. The Real Property Commissioners could find no fault in it. Lord St. Leonards, a score of years later, was of the same mind. Objections could, in his view, proceed only from ignorance or perversity. In such words as these he expounded to the English landowner (the farmer

[1] 3 *Jurid. Soc. Papers*, 598.

had then hardly entered into his reckoning) the beatitudes of an English settled estate:—

"A desire has often been shown, not merely to improve the law of real property, but unnecessarily to alter it, and to admit only simple settlements after the fashion of the Code Napoléon. But the present plan of a strict settlement in this country is free from all objection. It does not place land *extra commercium*, but within reasonable limits enables the owner to transmit it to all his posterity; and from its very nature leads to successive settlements, which alone have kept many estates in the same families. . . .

"Thus are estates quickly re-settled, and the State does not, that I am aware of, suffer any inconvenience from such repeated settlements. No man in this country can justly complain that there is not sufficient land in the market on sale. . . .

"It is objected that these purposes are effected by a complicated and an expensive machinery; but who ever complained of the complex movements in a well-finished watch? We admire the connection of its parts depending on each other, and all necessary to form the combination which produces the desired results."

Metaphors are dangerous things. A well-finished watch is desirable not for the beauty of its machinery, but that its wearer may know the time of day. He will prefer a cheap watch that keeps fair time to a sidereal chronometer which is out of relation to men's common count of hours. Moreover, a watch is far from being a perfect machine; the watchmaking trade is peculiar in its constitution and division of labour, and improvements have been introduced only slowly and with great diffi-

culty. But this elaborate combination, it is said, "produces the desired results." Desired by whom and for whom? There is the point.

Behind the question of legal machinery there is the question of social policy, which has gradually been forcing itself on men's attention, Lord St. Leonards and other persons of authority notwithstanding. The results of a strict settlement are doubtless desired by its makers, and the purpose is effected with exceeding skill. But are they desirable for the common weal? Dealing with the land is hampered; not made impossible or impracticable, as sometimes appears to be thought, at least not if the settlement is framed by competent hands; but hampered it is, and it is idle to deny it. Powers of sale and management are useful, but they are not ownership. I have power to consult any book in a great law library by walking a few score paces from my chambers. But if there is a book I should rather like to consult, but can do without, the chances are that I shall not go. Every scholar knows the difference between having books at one's elbow and having to go out to see them. So it is with attempts to restore the uses of absolute ownership after dismembering its substance.

And there is a still graver economical objection to strict settlements than any real or supposed want of power to deal with the land. It is that they destroy the ordinary means and motives of an owner for dealing with it in the way of improvement. The life-tenant of a settled estate, "limited owner," as he is expressively called in modern Acts of Parliament, seldom has any capital to put into the land. Incumbrances created by previous settlements commonly leave no margin of

revenue beyond what is needed for barely keeping up the estate. And if the limited owner has other means, he is still without much inducement to apply them to the improvement of the estate; if he does so, he spends for the exclusive benefit of an eldest son who is already preferred by the settlement. He is much more likely to use his money for the benefit of younger children; and justly, so far as they and he are concerned; but this divorce of capital from land is a loss to the land itself, to the cultivator, and in the long run to the commonwealth.

Much has been said and written of the evils of strict settlement since the renewal of law reform which began fifty years ago, and sundry partial measures have been taken to palliate them. It is needless to describe these, for they have been mostly superseded by the Settled Land Act of 1882, due to Lord Cairns as its chief author, the object of which is to confer on "limited owners" as large and effectual powers of using the land to the best advantage as are compatible with settlements existing at all. By this Act a tenant for life[1] has powers of selling and leasing, and other powers of administration, without any special provision in the settlement, and, subject to certain safeguards intended to prevent abuse, and not burdensome, he may exercise them at his own discretion. He cannot, however, sell a principal mansion-house or heirlooms without leave of the Court. His powers cannot be released or bargained away, and no disposition purporting to abrogate or restrain them is valid. The purchase-money of land sold under the

[1] Certain other limited owners, whose position differs only technically from that of a tenant for life, are included in the Act.

Act may be spent (among other purposes) on the discharge of incumbrances, or on improvements of several specified kinds. Expenditure on improvements is subject to the control of either the Land Commissioners (a body constituted by the amalgamation of the former Inclosure, Copyhold, and Tithe Commissions) or the Court. No power is given to raise money from the land by mortgage as distinct from sale in order to execute improvements on it; this can be done, by a somewhat tedious process, under an Act of 1864. The list of authorised improvements, however, is extended by the Settled Land Act. It must be observed that the Act does not alter the beneficial title to the settled land, or the investments representing its value, or the increased value given to part of the land with money obtained by selling another part. The tenant for life cannot enlarge his own interest; he can only decide in what form the property shall be handed on to those who come after him. He may leave them fewer acres with equal or greater value, in the shape either of incumbrances taken off or of improvements added. He may even leave them money instead of land. So far he can alter the subject-matter of their rights; but the rights themselves he cannot touch.

It is too early to say what will be the economical effects of the Settled Land Act. No such carefully devised measure of administrative reform in our land laws has been passed since the Fines and Recoveries Act. Probably its framers have succeeded in their intention of removing every obstacle to dealing with settled land that is not involved in the very existence of settlements. Experience must show how far the

country will be satisfied. Reforms of this kind are most useful for their time, and their promoters deserve all honour. But they all add to the complications of a system already too complex; and sooner or later the day must come when the system will no longer bear this process, and reconstruction must be faced.

The traditions of English character, the circumstances of an age of commerce, and the example of other English-speaking communities, all seem to point to the simplification of landholding and the encouragement of absolute ownership. On the other hand, there are certain speculative reformers, just now very loud and busy, who will have it that private ownership of land is altogether wrong, and instead of desiring that, so far as may be, every man should be his own landlord, are for making the State every man's landlord. To discuss such schemes is not within my province. As Sir Arthur Hobhouse has well said,[1] "they are hardly proposals for the alteration of the laws relating to land, or of any other branch of municipal law commonly so called; but rather for shifting the very basis of English society, and remodelling it on different theories of property, and of the relation between the State and individuals."

It will be time for lawyers to take a serious view of what is barbarously called "Land Nationalisation" (but it deserves a barbarous name) when its advocates have shown themselves capable, as thus far they have not, of appreciating the enormous difficulties that would beset an attempt to give tangible form to their vast and vague idea. No law could be framed for destroying private property in land, or (what some of these reformers take

[1] *The Dead Hand*, 1880, p. 164.

to be the root of mischief) the relation of landlord and tenant, without hundreds of keen-witted men forthwith setting themselves to evade it. The history we have surveyed has given us, perhaps, examples enough of what happens when the letter of laws is matched against the nature of man and of things.

As to the question of public economy, I have nothing to say of it. Not only is it not my business here, but I cannot imagine that those who are not convinced by Mr. Fawcett[1] are likely to be convinced by anything I could add. It is said that working men in London are found apt to be taken with these projects of national socialism. It may be so; too few of them are ballasted in their course by much, or any, of the magic of ownership. But the artisans of the north country are already in great part, through the operation of building societies (as I am told by those who should know), full owners of the homes they dwell in. Let such a working man understand that our new social reformers will confiscate his well-earned cottage neither more nor less than the squire's mansion and the manufacturer's mill—that he too is to become a rent-paying tenant of the State, or a so-called occupying owner taxed up to the rental value of his holding—and I think he will prefer his risks of poverty to such progress as the social enthusiasts of the East or the West have to offer him.[2] We may be permitted to trust that the progress of English laws and

[1] "State Socialism and the Nationalisation of Land," *Macmillan's Magazine*, July 1883 (since republished in pamphlet form).

[2] The Congress of Trades Unions, held while these lines were passing through the press, refused by a large majority to entertain a resolution of that fashion.

society will be, as it has been, in a steady course of rational reform; that men of power and wisdom may be with us in time of need in the future, as they have been in the past; and that the terrible fascination of revolution may remain, as it yet is, alien and impotent among our people.

> Dea magna dea Cybebe, dea domina Dindymi,
> procul a mea tuus sit furor omnis, era, domo:
> alios age incitatos, alios age rabidos.

APPENDIX.

NOTE A.—THE GERMANIC LAND SYSTEM.

IT may seem idle to add one more interpretation of the much-discussed passage in the *Germania* of Tacitus (c. 26). But the experiment will take so little room that it can do no harm. The critical words are these :—

Agri pro numero cultorum ab universis in vices [the other reading *vicis* appears to be only an early conjecture, see Orelli's notes] occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia praestant. Arva per annos mutant, et superest ager.

I would translate to this effect: "The German community takes up a tract of land in shifting possession, according to the number of its husbandmen. The land so occupied is then allotted among the members in proportion to their rank, the extent of open ground making this process a simple one. The arable allotments are shifted yearly, and there is unallotted land to spare."

First, what does *universi* mean? It might mean a whole tribe or nation, a State as we may fairly call it if we remember that it was not organised like the modern State. But the partition of lands, newly occupied or otherwise, between individual cultivators is the work not of the State, but of the smaller community which appears on various scales and under various names, and for English purposes may best be called a township. It is possible, and indeed probable, that from the earliest times not only the kings but other great men had large portions of the folk-land allotted

to them in separate lordship by the State, and of course apart from the communal system. Such men were not members, but lords, of the communities which might be settled on their lands. But it is also probable from what follows that it is the communal system that Tacitus here has in view. If he is not over careful to distinguish the township from the State, or to let us know of which he speaks, the same may be said of much later writers on the subject. We may take his *universi*, then, for the township or communal unit, by whatever name we may choose to call it. The next ambiguity is about *in vices*, and is so great that I think a translation ought not to decide either way. Is it only a condensed anticipation of what is stated in the next clause, putting the shifting possession of individuals in contrast to the general title of the community or *universi*? Or does it refer to the community as a whole, and signify that, as in the state of things described by Cæsar, the township migrated bodily from year to year? That state of things (*B. G.*, 6, 22) may be described, in our native terms, in this way. Book-land is wholly unknown. Common land is held only as an allotment of folk-land to the particular township (gentibus cognationibusque hominum qui una coierunt), subject to annual repartition of the whole land of the tribe (magistratus ac principes in annos singulos . . . quantum et quo loco visum est agri attribuunt atque anno post alio transire cogunt). If the township as a whole moves, of course each man's homestead must move too. This, however, is compatible with his having, as between himself and the township, a permanent title to a certain kind and proportion of homestead-plot out of the common land. Compare the shifting fee-simple in variable parcels of land recognised even by our modern books in certain cases, of which common land subject to annual partition is the chief. (Co. Litt. 4*a*.)

This meaning appears to me the more natural one, as far as the words themselves go. Nor, bearing in mind the remark last made, does it conflict with Tacitus' implied assertion above (c. 16) of several property in the homestead (suam quisque domum spatio circumdat). He does not say that the homestead was fixed in one place. There might be a permanent estate in it, subject to annual or other change

of site. In this view Tacitus would say almost exactly what Cæsar says. On the other hand, it would be as much, or even more, in Tacitus' manner to use *in vices* as forming a sort of antithesis to *ab universis:* thus he would say that the possession is at once continuous and shifting, continuous as to the township, shifting as to its individual members. Nor are we bound to make Cæsar and Tacitus agree.

But we are bound, I think, to find a meaning for *mox* in the following sentence. The common land is allotted "afterwards." After what? I do not see to what this can be referred unless to the taking possession by the township of previously vacant or vacated lands. Therefore I conclude, on the whole, that, according to the information Tacitus had, the township was as a rule still migratory.

As to the process of partition, it is clear that already there were distinct degrees of rank, that the more worshipful man got more land allotted to him, and the less worshipful less. "Arva per annos mutant" is taken by some good authorities to refer to the course of husbandry, and signify the alternation of crop and fallow. But it seems to me to have a more obvious and natural meaning, which there is no reason to depart from. It states the fact that every man had, or might have, a different parcel allotted to him each year. It might also import that the *universi*, the whole township, occupy a new tract for tillage from year to year. Tacitus was capable of making the words carry both meanings. In like manner "superest ager" may refer to the unallotted common land of the township, or the vacant folk-land of the tribe not allotted to any township, or to both: I suspect to both.

Lastly, why does Tacitus use such a vague term as *universi*, instead of saying with Cæsar, whose account was doubtless before him, *gens* or *cognatio hominum?* Perhaps because he knew that the township had ceased to be a *cognatio hominum* in any real sense, and could not find any other definite Latin word that would not have misleading associations.

Note B.—The Classification of Anglo-Saxon Estates in Land.

All authorities are now agreed on the leading distinctions. Folk-land was the property of the State, *ager publicus*. It is sometimes called *terra communis* in the Latin charters (*Cod. Dipl.*, Nos. 714, 800). Bóc-land was land granted by written charter to be held as several property, and generally, though not necessarily, free from most of the public burdens imposed on land held by other kinds of title. There was also land held by townships or other communities, and enjoyed in common by their members for pasture and the like. Further, there were lands of inheritance held in severalty by customary titles, and derived originally, as it is presumed, out of common land. For these two cases we do not know, or know but imperfectly, what the old English terms of art were; "éðel" is used by the best modern authorities to denote the hereditary allotment, and "common land" speaks for itself. Lǽn-land was land held by an occupier rendering rent or services, or both, from an owner who did not part with the ownership of the land, but only with its use.

Divers questions, however, remain unsettled as to the relations of these kinds of land to one another, and their relative importance in practice.

Mr. H. Cabot Lodge ("The Anglo-Saxon Land Law," in *Essays in Anglo-Saxon Law*, Boston, U.S., and London, 1876) has shown much ingenuity in working out a scheme of Old English land tenures in a form satisfying to the modern legal mind. The Anglo-Saxon mind, as the essayist himself allows, was not modern, or legal in the modern sense. Thus the definitions and distinctions, when arrived at, are almost certainly more precise than anything that our ancestors habitually realised in either thought or language. In one or two matters Mr. Lodge's nomenclature, though logical in itself, seems to be historically without authority; and, as a systematiser almost inevitably does, he overrates the differences between himself and his forerunners in the same field. Kemble was fully aware of the distinction between the

hereditary estate which he calls *éðel*, originally not alienable at all, and later alienable only within limits, and the fully alienable bóc-land. Kemble's *éðel* is what Mr. Lodge calls "family land," and I prefer to call "heir-land;" he gives *alod* as an alternative term, presumably in deference to the usage of some previous writer, for there is no reason to believe that *alod*, which is assumed by modern etymologists as the base of the med. Lat. *allodium*, was a real English word in historical times.[1] Kemble supposed, however, that at an early period land of this quality had practically disappeared, having either reverted to the State (or rather community) for want of heirs, or been turned into book-land. (*Saxons in England*, i. 301; "towards the closing period of the Anglo-Saxon polity, I should imagine that nearly every acre of land in England had become bóc-land," *ibid.* 306.) Yet he had formerly said (*Cod. Dipl.*, Intr., lxi.) he was inclined to think that the great mass of rent-paying land did not pass by charter at all. It appears to me that this first view of Kemble's is the correct one, and that his later opinion is untenable. It is improbable in itself for more than one reason. I do not see how heir-land could have been legally made into book-land to any considerable extent. I rather conceive that book-land was, with few exceptions, a luxury confined to great landholders and ecclesiastical corporations; the exceptions being cases where owners of book-land made relatively small grants out of it by book to favoured dependants. To speak technically, I see no reason to believe that the Anglo-Saxon "book" ever became a "common assurance of the realm." It is now common learning that to turn folk-land into book-land required the consent of the Witan; and accordingly I should rather (with Kemble himself) liken the "book" to a private Act of Parliament. In fact, Beda speaks of grants by

[1] The English form would be alleád or æleád. One would be quite prepared to find it, but so far as I am aware there is nothing to show its existence. The occurrence of *alodium*, *alodiarii*, in Domesday proves only that the term was more or less familiar to the Norman surveyors. If it represented an English alleád in regular use, one would expect it to appear much oftener than it does. When *alodium* does occur in the Latin version of English documents, it stands for bóc-land; probably this was the regular usage of English clerks in the eleventh century.

book as *litteras privilegiorum* in his letter to Egbert, thus pretty plainly showing that they had not acquired the character of common assurances in his time. *Privilegia* occurs again, late in the ninth century, as a synonym of *libri hæreditarii* (*Cod. Dipl.*, cccxxiii., and several other places in later charters).[1] There is likewise a certain amount of positive evidence that heir-land existed and was dealt with as something distinct in kind from book-land, notably in the will of Duke Alfred of Wessex (*Cod. Dipl.*, cccxvii.) This evidence, though meagre, appears sufficient, and we need in no way be surprised that there is not more. Heir-land was alienable *inter vivos*, if at all, by the customary and popular modes of assurance of which traces may still be found in copyholds, and of which no written record would in those times be kept. Wills were made only by the greater landowners, and they seem not to have been drawn in technical language; at any rate they seldom specify the land devised as being book-land or otherwise. But of those we have some purport to be made with the witness of the testator's family, which looks as if part at least of the lands included in the will could not be dealt with unless by their consent. On the whole, it seems the better conclusion that heir-land held its own down to the Conquest.

It should be mentioned that K. Maurer's authority, as well as Kemble's, is against the view now taken. He regards the conversion of *éðel* into bóc-land as an easy and constant process. But, assuming that private persons could create book-land at all, we must at least suppose that, as to make it out of folk-land required the consent of the Witan, so to make it out of heir-land would require the consent of the family, if not also of the community. And if such acts were common, why have we no charters recording them? Professor Sohm also, following K. Maurer and Schmid, assumes that the A. S. "book" was the common mode of assurance, and goes so far as to deny that symbolical transfers were used at all before the Conquest. (*Frankisches Recht und römisches Recht*, Weimar, 1880, p. 30.) For the reasons already given, I think the absence of records quite inconclusive; and, besides, it is not the case that we find before the Conquest "keine

[1] I do not care to lay much weight on this, however, as the mediæval usage of *privilegium* was no doubt loose.

Spur der Investitur." There are half-a-dozen examples in the *Cod. Dipl.* See Nos. 12, *37, 104, 114, *177, 1019. In No. 114 a sod from the place is expressed to be delivered along with the book. In the other cases it is mentioned to have been placed on the altar or on the book of the Gospels. Two of the charters, here also noted by an asterisk, are marked by Kemble as forgeries. But the like incident must have been found in genuine originals which the forger was imitating. Two other cases may be added, from the Black Book of Peterborough, in a record printed by Professor Stubbs in 1861, and accepted by him as genuine. Early in the eighth century "Æthelred, the glorious king of Mercia, on the occasion of a visit to Medesham-stede, gave to the brethren he found there thirty manentes at Lengtricdun, and confirmed the gift by placing on the Gospels' Book a sod taken from the place." Again, a purchase of lands at Cedenanác from the king "was ratified at Tonitun (Northampton ?) in the king's chamber by joining of hands, and by placing a sod from Cedenanác on the Gospels' Book, in the presence of Bishop Saxulf." Here we seem to catch the very moment of the final struggle of the older symbolical ceremony with the "book," which for great occasions was to supersede it —if, indeed, it did so; for, as Palgrave has observed (*Proofs and Illustrations*, ccxxviii.), the silence of most charters as to any symbolical delivery really proves nothing. My own belief is that for the common occasions of private persons the symbolical transfer never went out of use. It seems to me no extravagant supposition that many of the symbolical customs still found in copyholds, such as surrender by a straw in the manor of Winteringham, in Lincolnshire (*Academy*, Nov. 19, 1881, p. 386), are really of immemorial antiquity. On Sohm's and Schmid's theory they would be late mediæval imitations of the Franco-Norman custom.

It seems far-fetched, however, to find in the laws of Alfred an attempt to convert book-land into heir-land by way of reaction towards pure Teutonic principles (*Essays in Anglo-Saxon Law*, pp. 70, 71). The law says that a man who has inherited book-land from his kindred must not give it from the family "if there be writing or *witness* that it was forbidden by those men who at first acquired it, and by those

who gave it to him, that he should do so." Probably this was only a confirmation of existing law (compare the preamble), and it rather goes to show that restrictive clauses were often disregarded than anything else. But it does seem to allow validity to restrictions of this kind not expressed in the book itself, but only declared by the donor in the presence of witnesses; a point not noticed by Mr. Lodge. So far we may say that the peculiar quality and privileges of book-land were kept in check by the old family principles.

Another question is that of *lǽns*. Mr. Lodge divides lǽns into two classes, booked and unbooked. The booked lǽn falls into the genus of book-land; the unbooked lǽn may be derived out of any kind of superior interest, booked or not booked. Kemble holds that the term *lǽn* was not properly applied to any booked interest whatever, so that his *lǽn* (and Schmid's, see his Glossary, *s.v.* Folcland) is Mr. Lodge's "unbooked lǽn." The difference is really one of nomenclature. Mr. Lodge's nomenclature is the more logical; but we have no right to assume that our ancestors of the eighth or even the eleventh century were logical, and to make good his point historically Mr. Lodge should produce clear instances of the term *lǽn* being applied to interests created by book; whereas his instances go to show that when an existing interest was booked the tenant's estate not only became book-land, but ceased to be called lǽn-land. As to Mr. Lodge's proposition that every estate of folk-land was an unbooked lǽn, I venture to think, with as much confidence as one can have in a matter where the positive evidence is so scanty, that no Englishman before the Conquest, layman or clerk, would have understood it. The essence of lǽn, as far as one can make out, was holding under a definite person as superior by specific services. The tenant of folk-land might be the lord of other persons, and might let out the whole or part of his folk-land to them by way of lǽn. But his own holding was not a lǽn according to the only usage of the word which is known to us. He held not under any person, but under and by the allotment of the State. The land in his hands was subject not to private, but to common and public payments and services. Mr. Lodge is hardly entitled to charge historians with con-

fusion of thought for following the nomenclature of their authorities.

It must be allowed that the distinction between the *folk-land* belonging to the State and the *common land* belonging to particular communities has been too much slurred over by most writers on the subject. Konrad Maurer's very clear discussion (in *Kritische Ueberschau*, Munich, 1853) must, however, be specially excepted from this remark. It may be difficult to say how far the distinction was maintained in historical times; but in any case we ought to start with a clear conception of it. With regard to the common Old English phrase to sit on the land, as applied to the tenant of lǽn-land, it is of some interest to note that it remained in use all through the Middle Ages. "Whosoever sitteth upon the ground of any man . . . the lord shall have an hariot of him as of another." (Customary of Tettenhall Regis, *ap.* Toulmin Smith, English Gilds, 432.) "The sitting" (as opposed to "quitting") "tenant" is a familiar expression to this day.

Another question worth considering is whether common land might not itself be held as parcel of the folk-land: that is, whether land might not be allotted to a community without the State losing the ultimate property therein. This must indeed have been the case when the community was still migratory, as described by Cæsar and, in my view, by Tacitus. Or the same result would be produced by a community settling bodily, or else encroaching, on folk-land not formally allotted. Now what would be the effect if folk-land thus occupied were turned into book-land by a grant from the King duly approved by the Witan? It would operate, it is conceived, as a conveyance of the lordship and revenues of the communities settled on the land. It seems a tenable position that a large proportion of the grants of book-land were in truth grants of lordship and revenues and of nothing else. And here we have a probable origin of many of the dependent vills and townships which certainly existed before the Conquest.[1]

Perhaps we may even suppose that all common land theoretically remained folk-land, though the State had aban-

[1] Cf. Nasse, *Mittel. Feldgemeinschaft*, p. 17; and Digby, *Hist. of Law of R. P.*, p. 16.

doned its original power of resumption and redistribution. And if this theory applied to heir-land held in several ownership, as well as to the common land out of which it was originally derived, the division into folk-land and book-land would be really, as the earlier writers on the subject supposed it to be, an exhaustive one.

NOTE C.—VILLENAGE, VILLEIN TENURE AND COPYHOLDS.

The first condition for a clear understanding of the "base tenures" of our books is to keep in view the distinction between the tenure of the land and the personal condition of the tenant. For this, as recognised in the thirteenth century, the classical authority is Bracton. He mentions tenants on the king's demesne, whose ancestors held by free services, but were put out by the strong hand, and were allowed to take back their holdings to be holden in villenage by base but certain and assigned services (cp. as to this *Dial. de Scaccario*, I., c. x.) These tenants are personally free, "since they perform their services not in regard of their persons, but in regard of their holdings." Compare as to this the old English document called *Rectitudines Singularum Personarum*, § 2, p. 372, in Schmid's collection: the "cot-setla," who renders labour-rent such as after the Conquest was called servile, is personally free, for "he is to give his hearth-penny on Holy Thursday as every free man ought;" so Kemble has well noted, *Saxons in England*, i. 323. To return to the demesne tenants in Bracton, they cannot bring the ordinary real actions "but only the little writ of right according to the custom of the manor;" that is, the jurisdiction was in the king, not as king, but as lord of the particular manor. They were called *glebae ascriptitii* (cp. again the *Dial. de Scacc.*, *loc. cit.*), but Bracton regarded this as expressing not a bondage, but a right; not that they might not go elsewhere, for "they shall not be enforced to hold such a tenement unless they will," but that the lord cannot remove them as long as they perform the services (fo. 7*a*). Again, "the tenement changes not the condition of a free man any more than of a slave. For a free man may hold in mere villenage,

doing whatever service thereto belongs, and shall none the less be free, since he does this in regard of the villenage and not in regard of his person. . . . Mere villenage is a tenure rendering uncertain and unlimited services, where it cannot be known at eventide what service hath to be done in the morning, that is, where the tenant is bound to do whatever is commanded him" (fo. 26*a*). Again, "another kind of tenement is villenage, whereof some is mere and other privileged. Mere villenage is that which is so held that the tenant in villenage, *whether free or bond*, shall do of villein service whatever is commanded him, and may not know at nightfall what he must do on the morrow, and shall ever be held to uncertain dues; and he may be taxed at the will of the lord for more or for less . . . yet so that if he be a free man he doth this in the name of villenage and not in the name of personal service . . . but if he be a villein [by blood], he shall do all these things in regard as well of the villenage as of his person" (fo. 208*b*). The only difference in the services was that the *merchetum* on marrying a daughter, being an incident of personal servitude (as a fine paid to the lord for depriving him of a slave), was not demandable from the free man holding in villenage. Privileged villenage is then described as the tenure of the personally free men already mentioned in the passage first cited. I suppose the personally free man who held in villenage, privileged or not, might always perform the services by deputy if he could find one.

Thus in Bracton it is quite clear that the conditions of the tenure and the personal status of the tenant have no necessary connection. Not only a free man may hold servile land, but a serf may hold and deal with free land as against everybody but his own lord (fo. 26*b*). And in Littleton, and Coke's commentary on his text, the distinction is equally clear (compare Co. Litt. 57*b*, 58*a*, with Litt., s. 172, and Co. Litt. 116, 117). There is already a source of confusion, however, in the double meaning of *villanus*. At the time of Domesday the serf by blood was called *servus* (later *nativus*), never *villanus*. But gradually, by a kind of euphemism, the word *servus* was dropped, and *villanus* came to mean sometimes, as aforetime, a man holding by a certain

kind of service, but often a man personally unfree. In Glanvill we see the terminology in a state of transition. He always calls the serf *nativus*, but his condition (not merely the tenure, but his personal state) is called *villenagium;* a reclaimed serf is said to be *in villenagio positus*, or *in villenagium clamatus*. Bracton freely uses *villanus* as synonymous with *nativus*. By Littleton's time the word villein seems, as a rule, to have imported personal servitude, though a careful man might speak of a "villein in blood" if he meant to secure himself against mistake. The distinction in substance, as above said, is still perfectly clear. Coke, I think, misinterprets Littleton in one place, s. 209. Littleton says that the lord of a manor cannot prescribe for a fine payable by every tenant within the manor who marries a daughter without the lord's licence: "for none ought to make such fine but only villeins." Coke's gloss on this is as follows: "that is, either villeins of blood, or freemen holding in villenage or base tenure." Comparing Bracton's more explicit statement, I think Littleton must have meant to exclude, not to include, freemen holding in villenage (s. 174, which suggests the contrary, and is cited by Coke, is not part of Littleton's own text, but an interpolation. See the note in Tomlins' edition, 1841). But if Coke is wrong, it is only on a detail. When we come to Blackstone (Comm. II. 92-96) the confusion is complete. He writes as if wholly unaware that *villanus* ever meant anything but a personal serf: the *liber homo tenens in villenagio* somehow escapes his notice altogether, and the early copyholder is represented by him as an enfranchised serf and nothing else. Blackstone's confused and misleading account has been adopted, so far as I know, by all modern text-writers before Mr. Kenelm Digby, who, going back to Littleton and Bracton, restored the distinction which Blackstone had obscured. He would have done still better, I venture to think, if he had more pointedly called attention to it, as the late Mr. Taswell-Langmead has since done in his *Constitutional History* (pp. 291-300, second edition). The blundering of Blackstone's Commentaries on this point is the more remarkable, inasmuch as his Considerations on Copyholds show that he

at one time read and to some extent appreciated the earlier authorities. Putting the tract and the Commentaries together, his theory, so far as he had one, appears to have been that personally free men holding in villenage existed, but were a very small class, and were ultimately represented by the customary tenants not said to hold at the will of the lord; that the ordinary copyholder always represented a *nativus;* and that the tenure of the *nativus* was not only burdensome but wholly precarious until long after the Conquest. This would be as pretty a theory as another if it were not flatly contradicted by the facts, as it is the moment we go at all below the surface.

As to the personal condition of the serfs, modern scholars seem pretty well agreed that legally it might have been one of great hardship, but in practice they were for the most part not so very badly off. The least favourable view of their position I have met with is Nasse's, the most favourable, Mr. Larking's (*Domesday of Kent*, note 57) and Mr. Thorold Rogers' (*History of Prices*, vol. i.) These last writers appear, however, at least as much concerned to make out the state of the modern labourer worse as to make out the state of the old *nativus* better. Mr. Thorold Rogers certainly underrates the positive evidence that personal servitude, as distinct from attachment to the soil, was known long after the Conquest. For example it was elaborately discussed in 1302 whether a neif marrying a free man became free absolutely or only during the coverture (Y. B., 30 & 31 Ed. I., p. 164). Again, in 1305, it is pointedly stated by the Court, the question being whether free or villein service is due from certain land, that a plea of the tenant's personal freedom is irrelevant as regards the land (Y. B., 33 Ed. I., p. 10). Probably it was not common for serfs to be sold apart from the land, but there is no doubt that it was sometimes done (Madox, *Form. Anglic.* Nos. 756-762). In the absence of evidence it would be a plausible theory that the ignorance or carelessness of Norman surveyors and judges confused the lowest classes of free men with the serfs, in which process the dependent free man lost something, but the serf who formerly had no rights at all ultimately gained much. Such a view is taken by Professor Stubbs (*Const. Hist.*, I., 429)

and also by Mr. Freeman. But the evidence shows a displacement and shifting rather than a confusion of the names, and possibly to some extent the actual state, of different classes, a *Standesverschiebung* as one might say in German. In the Exchequer Domesday we find on the manors of St. Paul's four distinct kinds of tenants, Villani, Bordarii, Cotarii, Servi. In the *Domesday of St. Paul's*, A.D. 1222, or in round numbers a century and a quarter later, we find Tenentes of several descriptions (libere tenentes, tenentes per vilenagium, tenentes terras operarias, tenentes de terra assisa, and others), Cotarii, and Nativi. Archdeacon Hale's inference is best given in his own words. "The ancient names, that of the Cotarii excepted, had, as it appears, fallen into desuetude; the relations, however, in which the services and persons of the Libere tenentes, the Tenentes terras operarias, and the Nativi, stood with respect to each other, and to the lord of the manor, are so distinctly marked as to leave but little doubt that in those three classes we have the representatives of the Villani, Bordarii, and Servi of the earlier age, under titles of a higher order, and which less plainly indicated the servile character of the services which were due" (Introd. to *Domesday of St. Paul's*, p. xxvi.) It seems hardly rash to suppose that in the relatively favourable case of tenancy under an ecclesiastical corporation there had been some real improvement in the condition of every class of tenants. Anyhow there is the fact that in the thirteenth century the minuter distinctions which the Conquest might be supposed to efface were as far from having disappeared as ever, and went on under changed or shifted names. It by no means follows, of course, that all these terms imply differences of personal status. It is hardly possible (especially after Mr. Seebohm's recent work) to maintain that *bordarius* and *cotarius* signify anything but the general nature and size of the holding. But the leading types are well enough marked. In the eleventh century there was the free man in the fullest sense compatible with having a lord at all, who might "go where he would with his land." Then there was the dependent free man, who might seek a new lord if he chose, but at the cost of leaving the land: "potuit ire quo volebat, sed non cum terra." Such are the *coliberti* of Domesday in

Dorset, elsewhere called "sokemen" (Eyton, p. 46).[1] Then we have the still more dependent holder (*ascriptitius* in the language of the twelfth-thirteenth century authorities, such as *Dial. Scacc.*, II., 14), who cannot quit the land without the lord's consent. Last of all comes the thrall or *servus*. In the thirteenth century, I apprehend, these distinctions were by no means out of use, except that the power of seeking a new lord "cum terra sua" had disappeared, as being repugnant to feudal principles, and was replaced by the more convenient power of alienating the land to a purchaser. The *liber homo*, *ascriptitius*, and *servus*, were still separate and defined conditions of men. The "ascriptitii qui villani dicuntur" of *Dial. Scacc.*, I., x., seem to be not serfs but degraded free men. Again, we know that villenage by blood, as distinct from villein or customary tenure, existed and was recognised not only in books but in practice down to the seventeenth century. "Queen Elizabeth in 1574 issued a commission for the enfranchisement of most of the bond-servants in the manors belonging to the Crown. And there is a case reported as late as the fifteenth year of James I. in which an issue as to villenage was tried" (Elton, *Custom and Tenant-right*, p. 29). In the face of this it is impossible to hold that the sections of Littleton on villenage, for example, are the mere survival of legal pedantry describing obsolete institutions as if they were still alive.

Thus much of the persons. Now for the tenure. It should really be needless at this day to contradict Blackstone's story that all our customary tenures were invented after the Conquest by the more or less capricious indulgence of the lords of manors. Only Blackstone's story was adopted in unquestioning faith by Mr. Joshua Williams (in days long before he learnt of the historians and wrote his excellent book on *Rights of Common*), and so continues, it must be presumed, to be taken for gospel by the majority of law students. Therefore it may be worth while to recapitulate the facts.

[1] Mr. Eyton treats the *villani*, in Dorset at any rate, as an unfree class; but I fail to see why. Doubtless they were inferior to the *censores*, who already paid a fixed money-rent for all service; but payment of labour-rents is quite compatible with personal freedom, otherwise no free man could ever have held in villenage.

1. There is no reason whatever to suppose that the actual tillers of the land were materially disturbed by the Conquest, except where, as in Yorkshire, the land was harried as a punishment for stubborn resistance.[1]

2. Customary tenants are, in point of fact, found existing from Domesday till now without any discontinuous change in their tenure or its incidents: unless we are to count for such the final allowance, temp. Ed. IV., of their right to maintain their title in the King's courts even as against their own lord.

3. The customs themselves bear every mark of archaic origin. Transfer by symbolic ceremonies (which Blackstone mentions in a sufficiently appropriate context, Comm., II. 313, but without seeing its real significance); a variety of rules of descent, showing affinities to early customs preserved in other parts of Europe; and the record and attestation of title by the manorial courts, which as a rule, if not always, represent ancient popular courts; all these things point not to feudalism or to usages springing up under feudalism, but to a state of society far older.

4. The country where common fields abound, as we learn from the facts collected and discussed by Nasse, is also the country of small copyholds. We know that common fields represent a primitive system of agriculture. If copyholds equally represent a primitive system of tenure, it is natural that where the one persists the other should persist also. If, as the popular account would have it, copyholds are of post-Norman origin, the coincidence is inexplicable.

When Sir Edward Coke said that copyholders come of an ancient house, he spoke more truth than he knew. The ancient customary holders of land under a lord who were not great men enough to hold their estates by charter before the Conquest, and have them confiscated after it, are represented by the modern copyhold tenants, and in most cases we may well think that the customary tenant practically had a fixed tenure from the first. There is a significant entry in the St. Paul's inquisition of 1222 (*Domesday of St. Paul's*, ed. Hale, p. 52): "Terre akermannorum quas dominus

[1] Cf. *Domesday of St. Paul's*, Introd., p. xxx.

potest capere in manu sua cum vult sine iniuriis hereditarie successionis." The words as they stand might be clearer: but, the lord being here an ecclesiastical corporation, the hereditary succession spoken of must be the tenant's, and thus it appears that while the holding was nominally at the will of the lord, the lord's power was in some way limited by the claim of the tenant's heir. This is in the thirteenth century, somewhat earlier than the time when Bracton described villein tenure and services as quite precarious. Again it appears from the *Extenta Manerii* that in 4 Ed. 1 (A.D. 1275) the surveyor of a manor expected to find free tenants—not merely personally free men, but *libere tenentes* —who had no deeds. "Item de liberis tenentibus . . . et qui tenent per cartam et qui non." These are unaccounted for by the system of the text-writers.

After all, there is no reason to suppose that the lawyers of Westminster in the thirteenth century were less dogmatic or more disposed to pay attention to the real facts and working of local usage than their followers in the sixteenth or nineteenth.

I do not say that in every case copyhold is an ancient customary holding. It is possible that servile tenements of the most precarious kind may, in the course of the Middle Ages, have grown to some extent into customary estates. Nay, I think there is one class of copyholds which may with considerable probability be referred to such an origin, the copyholds of so-called imperfect tenure which are still frequent in the western counties (Elton, *Custom and Tenant-right*, p. 63). These are the copyholds for lives or years where the fines are still uncertain, and there is no strict right of renewal; a kind of estate which, in Mr. Elton's words, "by the severity of the lord's exactions, and the recurrence of a servile phraseology, is shown to have descended from the precarious holdings of the *natives* who could call nothing their own." Long as it has taken to establish even an inchoate tenant-right, I should be disposed to put back the origin of these holdings far beyond the Norman Conquest. They prevail only in the West of England, if indeed they are found at all elsewhere. There is no reason why this should be so if they began as the holdings of English serfs

or degraded free men. But there is every reason why it should be so if they began as the holdings of a conquered British population who remained as the serfs and tenants at will of the English invaders on the land which had formerly been their own. In the east and south-east the British tillers of the soil were slain or dispersed. The remnant who may have been reduced to servitude left no distinct traces on the new form of society. In the west the English conquest was milder and more gradual. Still it was a conquest by the strong hand, and the relation of mere sufferance which Blackstone imagined between the Norman lord and the English customary tenant is like enough to have really existed between the victorious English settler and the Welshmen who were the captives of his spear. It seems a fair conjecture that the servile holdings of the West-Welsh, little or not at all affected by the Norman conquest, have all these centuries been growing into what we now know as copyholds of imperfect tenure.

In the case of the peculiar "conventionary" holdings of the Cornish mining country, where the tenant has an inheritable interest, but must be re-admitted every seven years, something like proof of a Celtic origin is attainable. This custom, fully described in Concanen's special report of Rowe *v.* Brenton, presents distinct analogies to the customs of Brittany.[1] Considering, again, the extreme antiquity of tin mining in Britain, it seems at least probable that the "tin-bounding" custom of Cornwall (and formerly of the contiguous parts of Devon also), and the similar customs which exist in the mining district of Derbyshire, come down to us from a time earlier than the English occupation; and, indeed, when we remember that in Cornwall the English occupation is allowed to have been of the most superficial kind, even by those who are least favourable to the preservation of Celtic elements elsewhere, there is hardly room for two opinions on this point.

What is above suggested as to the origin of the imperfect copyholds of the west of England may perhaps be strengthened by consideration of the manner in which personal villenage

[1] *Coutumier Général*, iv. 409 (usances locales du domaine congéable de Cornoaille).

was distributed over the country at the date of the Domesday survey. The Abstract of Population in the second volume of Ellis's Introduction gives the facts ready to hand; and in Mr. Seebohm's *English Village Community*, which has appeared since the substance of the present note was published in the *Law Magazine and Review*, they are exhibited with the help of graphical charts (p. 86). We find that the proportion of *servi* to the whole population steadily diminishes as we go from the southern and western parts northward and eastward. In Cornwall and Gloucestershire, the former still really a West-Welsh county, the latter still half-Welsh, the *servi* are almost one in four. In Devonshire they are little short of one-fifth, in Shropshire over one-sixth, in Dorset and Somerset not much under, and in Hampshire they are over one-seventh; in Worcestershire and Wiltshire it is about the same.[1] As we cross from west to east there is a notable change; the average in the southern midlands, such as Berks, Oxfordshire, Warwickshire, is roughly one-eighth. As we go on to Leicestershire, Nottinghamshire, Staffordshire, Norfolk, and Suffolk, we find the serfs ten per cent of the population at most. In Derbyshire there are hardly any serfs, and in Lincolnshire, Huntingdonshire, Rutland, and Yorkshire there are none at all. In the north-west, again, Cheshire shows a small proportion, less than one-twelfth. In the south-east the distribution seems irregular; in Essex the serfs are about one-ninth, in Kent something less than one-tenth, in Surrey something more, while in Sussex they are less than one-twentieth. Local accidents of forest and fenland may in part account for these diversities; the less profitable soil would be more in servile occupation, and serfs would be employed as herdsmen in the uncleared or half-cleared forests. In any case the average is much below that of the western counties. In one word, the serfs are fewer in proportion as the English settlement of the country is more complete. This decreasing ratio from west to east cannot be an accident, and we are led to infer that both the descent and the tenures of the *nativi* represented by the present "imperfect copyholders" of the west were not English but Welsh. Not

[1] In Herefordshire the proportion is evidently high, but the numbers seem to be uncertain.

that there is anything I know of to exclude the possibility that the Welsh themselves before the English invasion had serfs, who may not have been Celts or even Aryans, or that these people left a permanent mark. Mr. Elton (*Origins of English History*, ch. viii.) has collected a mass of facts tending to show that the preference of younger to elder sons, which in this country survives in the form of borough-English, is derived from non-Aryan sources. And ethnologists appear to be satisfied that the physical characters of a prehistoric race of short and dark men who were certainly neither Teutons nor Celts are amply visible in modern England. But for the present purpose I keep within historic limits.

How the king's courts came to assume, as they did at least as early as the beginning of the fourteenth century (Y. B., 30 & 31 Ed. I., 168), that there was no villenage in Kent, is an unsolved riddle. The doctrine went so far that a man's freedom was established by showing that any of his ancestors was born in Kent, "quia esset impossibile servum procreare liberum" (Y. B., 33 Ed. I., 15). But in Kent itself such was not the opinion or practice, for villenage certainly existed there much later, as Somner has shown (*Treatise on Gavelkind*, pp. 73-75); to say nothing of the difficulty of accounting for the total disappearance, within two centuries or thereabouts, of the servile class registered in Domesday. The legal doctrine, which no less certainly was acted upon by the courts out of Kent, is a curious example of the rapid growth and acceptance of fictions even when the facts contradicting them are not remote or difficult of access.

As to Mr. Seebohm's theory of the English manor, which amounts to holding that Blackstone was wrong only in not dating his story far back enough, I can add but one word here to say that, while Mr. Seebohm has done excellent work on certain points, it does not seem to me possible to accept his conclusions as a whole.

Note D.—Primogeniture in Socage Lands.

There is still much obscurity about the manner in which primogeniture was extended from lands of military tenure to socage lands. It is certain that when Glanvill wrote—that

is, about a century after the Conquest—gavelkind was still the prevailing rule. In Glanvill's chapter on inheritance (l. vii. c. 1) the rule of primogeniture, as a rule of common law, "secundum ius regni Angliae," is expressly confined to lands held by military service. As to the land of a "free soc-man," it has to be ascertained whether the land was partible by ancient custom. If so, the sons take equally, saving that the first-born has the chief dwelling-house, on the terms of making recompense in value to the others. If the land is not partible, then, "according to the custom of some, the first-born shall have the whole inheritance; according to the custom of others, however, the last-born son is heir." Thus primogeniture and borough-English appear as local customs on an equal footing. The best specific evidence of customary primogeniture I know of is the case of certain inferior tenants of the Prior of Canterbury, who were called *liberi sokmanni*, but whose tenure had servile incidents (Elton, *Tenures of Kent*, 106). It has been suggested that in this case the rule was imposed after the Conquest on socagers who were driven by need or the strong hand to accept grants in base tenure (Kenny, *Essay on Primogeniture*, Cambridge, 1878, p. 31); but this, considering Glanvill's language, appears by no means a safe inference. There are also local rules of inheritance in various customary tenures, showing a preference of the eldest (or sometimes the youngest) daughter. (Elton, *Custom and Tenant-right*, Appendix D.) These evidently have nothing to do with feudalism.

In Bracton, writing after the lapse of nearly another century, we find a significant difference, though not at first sight a great one (fo. 76*a*). It is still a question in each case whether the heritage is by ancient usage partible or not. But if not, then primogeniture becomes the rule without further inquiry. Local custom is to be considered only in the case of villein tenure. Fleta (l. 5, c. 9, § 15) copies Bracton almost word for word. Bracton's language shows the tendency of primogeniture to increase, and the desire of lawyers to hasten the process. We cannot accept it, however, as showing how far matters had really gone; and for this reason, that it proves too much. What Bracton says does not admit of the existence of borough-English in any land of freehold tenure.

But we know that there must have been borough-English freeholds in Bracton's day; for there were such when Littleton wrote, and there are still such in our own day. Therefore, what we really learn from Bracton is that the lawyers of the thirteenth century, in their zeal to improve the position of primogeniture, were ready to outrun the actual law and practice as they existed then and have existed ever since.

Again, Bracton does not say or suggest that there was any presumption for or against the partibility of socage lands. Mr. Kenny (*Essay on Primogeniture*, p. 20) has called attention to a case, decided in the year 1200, as showing that by that time the burden of proof was on those who claimed under the custom of division. The record is short enough to quote in full (Placita de term. S. Mich., 2 Joh., Abbrev. Placit., p. 28*b*).

Rutland. Gilebertus de Beivill petit versus Willelmum de Beivill duas virgabas terre cum pertinentiis in Gunetorp que eum [*sic*] contingunt de socagio quod fuit patris eorum in eadem villa. Willelmus defendit quod socagium illud nunquam partitum fuit nec debet partiri et hoc offert defendere, etc. Quia Gilebertus nullam probam produxit consideratum est quod Willelmus eat inde sine die et quietus.

This, however, does not show that there was a presumption in favour of primogeniture; it only shows that there was no presumption to the contrary. The holding might or might not be divisible by ancient custom; whether it was so was a question of fact. It was the plaintiff's business, as in any other case, to prove the facts on which he relied, and among them that the land had from ancient times been divisible. Failing to prove this, he lost his cause. It does not appear that if the elder son had been plaintiff he would not in like manner have been called on to prove that primogeniture was the local rule.

It is certain, however, that during the thirteenth century primogeniture made great advances. Before the century was out it had come to be spoken of as the common law of England. In 1292 we find it said that "in some places as well the tenements holden in socage as other tenements are governed by the common law;" and the custom of Kent is already spoken of as peculiar (Y. B., 20 Ed. I., in Record Office Series, p. 327): but then, and some years later, it was

still an open question of fact whether given socage lands were partible or not (30 Ed. I., p. 50, A.D. 1302). There came a time, no doubt, and probably not long after this, when by making the rules of evidence more stringent the partible tenure, except in Kent, was extinguished. But specific evidence of the steps by which the process was completed appears to me to be still wanting.

NOTE E.—"CESTUI QUE USE" AT COMMON LAW.

The action of *assumpsit* was about contemporaneous with the doctrine of uses in its introduction and development: it became at last the common method of enforcing simple contracts, but originally was not an action on the promise itself, but on the breach of a duty incident to the promise, a "tort founded in contract," as the modern phrase runs. The object, in fact, was to get a remedy where the contract itself could not be sued on in any of the recognised forms of action. I do not know what there was to prevent the judges, if they had chosen, from holding that a conveyance to uses created a duty in the feoffees which would support an action of *assumpsit* in case of breach or neglect. Again, they might well enough have given *cestui que use* an action of account for the profits. Neither of these remedies, however, would have been anything like so effectual as the chancellor's decrees.

Bacon's summary of the mischiefs aimed at by the statute is worth citing. (*Works*, ed. Spedding, vii. 418.) "The particular inconveniences by the law rehearsed may be reduced to four heads; first, that these conveyances in use are weak for consideration" (*i.e.* made without fitting deliberation): "secondly, that they are obscure and doubtful for trial: thirdly, that they are dangerous for want of notice and publication: fourthly, that they are exempted from all such titles as the law subjecteth possession unto."

Notwithstanding the dislike of the common lawyers to uses, the sages of the law did not scruple to employ them for their own convenience. Littleton had lands in use, and in 1481 disposed of the use by his will (see it set out in the notes to his life in Tomlins' edition of his *Tenures*, 1841, p. xxxiv.)

Note F.—Settlements and Perpetuity.

Estates for life, followed by one or more estates tail in remainder, were a known form of disposition as early as the fourteenth century. In the Calendar of Patent Rolls for 7 Ed. II. (p. 76, ed. 1802) this grant occurs:

Rex confirmavit Ricardo de Pynelesdon pro vita, rem' diversis filiis suis in generali tallio omnia sua hereditamenta in Worthynbury in partibus de Maylorseysenells per servic' quartae partis unius feodi milit'.

On the next page is a grant of successive estates tail without a preceding life estate:

Rex confirmavit Johanni de Ellerker in generali tallio rem' aliis in generali tallio cert' haeredit' in Ellerker ei dat' per Episcopum Dunolm' [*sic*] pro annuo reddit' 3s. 9d.

In the later time of Edward I. there appear several grants in tail, often to a man and his wife, and sometimes there is a remainder in fee-simple (*ib.* p. 53, col. 2 at foot); but for the most part the grants abstracted are in fee-simple.

The history of the further development of settlements was traced by the late Mr. Joshua Williams (*Transactions of the Juridical Society*, i. 45). He states, as the result of a careful examination of documents preserved in the MS. collections of the British Museum, that limitations in substantially the modern form to the use of a man for life, remainder to his first and other sons in tail, were not uncommon in the latter part of the sixteenth century; the parties being content apparently to take the risk of the contingent remainders being destroyed by the feoffment (or other act amounting to a discontinuance), or forfeiture by waste, etc., of the tenant for life. The introduction of trustees to preserve contingent remainders in order to meet this risk is ascribed by a professional tradition, which was established by the middle of the last century (Blackstone, Comm., II. 172, cf. Lord Hardwicke in Garth *v.* Cotton, 1 Dick., 188, 191, and the arguments of the same case, 1 Ves. Sr., 524, 548), to Orlando Bridgman and Geffrey Palmer, where invention, it is suggested, was sharpened by the troubles of the Civil Wars to the better securing of their clients' estates.

In Orlando Bridgman's *Precedents of Conveyances* the limitation to a trustee, after the determination of the tenant for life's estate, and during his natural life, "upon trust only for preserving the contingent uses and estates hereinafter limited, and to make entries for the same if it shall be needful," appears in regular use (though sometimes it is omitted), and in that form it does not appear to occur earlier. Limitations curiously similar in form, though differing from this in substance, as careful examination will show, were, however, in use nearly a century before. In Holcroft's case, Moore, 486, we find an estate settled by fine in the second year of Mary (1554-55) to the use of Sir John Holcroft the younger for life "so long and until he attempt to alien, and then to the use of Hamlet [1] [Holcroft], and the heirs males of his body during the life of Sir John the younger; and immediately after his death" remainders to the first and other sons of Sir John the younger in tail male, down to the fourth son inclusive, remainder to Hamlet Holcroft in tail male, remainders over. The estate limited to Hamlet during Sir John's life comes exactly in the place where, in Bridgman's and later settlements, the estate of the trustees to preserve contingent remainders would come. But, for whatever purpose it was inserted, it cannot well have been to preserve the remainders to Sir John's unborn sons: for supposing that no son was in existence when Hamlet entered upon Sir John's attempt to alien (and assuming, which is not clear, that the "attempt to alien" refers to a tortious conveyance of the fee, and not merely to alienation of the life estate), then Hamlet's estate tail *pur auter vie* and his remoter estate tail in remainder would coalesce and shut out the intermediate contingent remainders. It seems to have been intended merely as a check on the tenant for life. Only one step, however, was needed to make an estate of this kind a protection for the remainders as well, and that step was taken by Bridgman and Palmer when they limited it to a trustee specially appointed for the purpose, and with an express declaration of the trust. Modern conveyancing as a whole, and the regular use of settlements in their

[1] Whence this Hamlet as a Christian name?

modern form, certainly date from about Bridgman's time. A brief but clear and admirably written account of the elements of the subject, both doctrinal and historical, is given in the part of Blackstone's *Commentaries* already referred to (book II. ch. 11): it ought to be needless to mention this, but the text of Blackstone is nowadays unduly neglected, partly by reason of exaggerated criticisms which have obtained currency, partly from the ravages it has suffered at the hands of so-called editors. Advanced students will of course consult Mr. Davidson's exhaustive introduction to his volume on Settlements.

As to the history of the rule against perpetuities, the following dates may be not without curiosity for readers of this note.

1681-1685. Duke of Norfolk's case (3 Ca. Ch.) Limitations to take effect within lives in being held good, and an attempted distinction between terms of years and freehold interests rejected.

1697. Lloyd *v.* Carew (Pre. Ch. 72, 106, and Shower, Ca. Parl. 137). Twelve months after lives in being, good.

1699. Scattergood *v.* Edge, 12 Mod., 287. Still doubtful whether a life or lives in being were not the extreme limit: "It was a great policy of the common law that alienation should be encouraged; for it is the greatest preserver and promoter of industry, trade, arms, and study; and this was visible from the making of the statute *De Donis*, until common recoveries were found out; and these executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail; and therefore there are bounds set to them, viz. a life or lives in being; and further they shall never go by my consent, let Chancery do as they please:" per Treby, C. J.

1736. Stephens *v.* Stephens. (Ca. temp. Talbot, 228.) Executory devise to an unborn child of a living person when he shall attain the age of twenty-one years held good. This was the conclusive decision.

1765. Blackstone. (Comm. II. 174.) "The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards."

1787. Jee *v.* Audley, 1 Cox, 324. (Sir Lloyd Kenyon, M. R.) The rule considered to be settled: "it is grown reverend by age, and is not now to be broken in upon."

1833. Cadell *v.* Palmer, in House of Lords, 1 Cl. & F. 372. The term not exceeding twenty-one years which may be added to lives in being is a term in gross, *i.e.* it need not have reference to any minority.

A very full history of the doctrine is contained in Hargrave's argument in Thellusson *v.* Woodford, 4 Ves., 247 *sqq.* (also separately printed in his *Juridical Arguments*, vol. ii.), and Sir E. Sugden's in Cadell *v.* Palmer.

The allowance of the period of gestation when gestation exists (but not as a term in gross of nine or ten months) is properly treated by the best writers on the subject as being not a special clause or part of this rule, but an application of the general principle that an unborn child is treated, whenever it will be for his benefit, as being actually in existence; and I have so stated it in the text. No apology seems needed for avoiding in a work of this kind the still controverted point whether there is only one rule against perpetuities, or remainders are also subject to another rule, namely, that an estate cannot be limited to any child or issue (as purchasers) of a person not in existence. The history of the doctrine points, I think, to the inference that this last proposition is but one of the various tentative statements which have been superseded by the general rule in its final form—a form which beyond question was unknown to the old expounders of the common law, and would probably have been condemned by them as far too lax.

A question in some measure connected with the doctrine of perpetuity is how far there can exist at common law a fee-simple determinable otherwise than by failure of heirs, or by the re-entry of the grantor or his heirs for a condition broken. To put the question in a concrete instance: apart from the Statute of Uses, and apart from any question of perpetuity, is a grant good in this form: To J. S. and his heirs as long as Lincoln's Inn Hall, or as a certain tree, shall stand? Plowden thought such a grant was good, *and operated by way of limitation, not condition* (which distinction must be carefully observed): Plowden, 557, cp. Scholastica's

case, *ib.* 414. And Coke in Seymor's case (10 Rep. 97*b*) says there is a fee-simple determinable by limitation, as distinguished from one determinable by condition; "as if A enfeoffs B of the manor of D to have and to hold to him and his heirs, so long as C has heirs of his body, and that is called a fee-simple limited and qualified." No remainder or reversion can be expectant on it. There is also a fee-simple determinable "implicit, and derived out of an estate tail," which is known as a base fee; its nature is comparatively common learning. In Liford's case (11 Rep. 49*a*) we read that "a man may have an inheritance in fee-simple in lands, as long as such a tree shall grow, because a man may have an inheritance in the tree itself." But this appears to be said only in the course of argument. The Year-book referred to (27 Hen. VIII., 29*b*) gives the fanciful reason that an estate may as well depend on the life of a tree as of a man. This also appears to be extra-judicial. Neither the reason in Coke's report nor that in the Year-book can be said to strengthen the proposition.

On the other hand, Coke's contemporary Anderson, Chief Justice of the Common Pleas, appears to have been of the contrary opinion; according to what is given in his reports (2. 138, 139) as the resolution of the Court in Corbet's case, the only determinable fee-simple (not upon condition) known to the law is a base fee, as, when a villein is tenant in tail, and his lord enters on him, or tenant in tail is attainted of high treason, the lord or the Crown has a fee-simple determinable on the failure of issue inheritable under the gift in tail: he seems to think parties cannot make a gift in fee-simple determinable in any other way than by entry for condition broken, which is a different matter. The cases and opinions in the year-books referred to in Anderson are partly unverifiable by reason of wrong or misprinted references, partly not to the point, being concerned with conditions against alienation by a tenant in tail, and in one place (13 H. VII., 24) there is an unresolved difference of opinion. If there be a feoffment in fee for "so long as J. S. has issue," it is asserted on the one part and denied on the other that the "condition" (but a condition in the proper sense can hardly be meant) is void; the reporter adds "ideo quaere."

Modern writers are not agreed either. Some are confident that such estates can exist, some that they cannot.

On the whole, it appears that the point has never been settled. I cannot help thinking that the silence of Coke's commentary on Littleton (where surely he would have explained the nature of such estates, and distinguished them from estates upon condition, had he deliberately allowed them: see especially 214*b*) weighs much against the dicta in his reports. Also it is strange that Littleton himself (ss. 380, 381, etc.) had nothing to say of such estates, if in his time they were known to the law. It may be that after the statute *De Donis* an estate to A and his heirs as long as B shall have heirs of his body (as put in Seymor's case) was exceptionally allowed, or thought allowable, by analogy to a base fee.

If a fee-simple determinable on an arbitrary event is a possible estate at common law, it seems to be not within the rule against perpetuities. It also seems probable that since the statute of *Quia emptores* the possibility of reverter would belong not to the grantor or his heirs, but to the chief lord of the fee. Whether such possibility (if any such there can be) is a "possibility coupled with an interest" within 8 & 9 Vict. c. 106, s. 6, so that it may now be disposed of by deed, is a point that may be considered at leisure by the curious.

INDEX.

The figures to which an asterisk is added refer to places where technical terms are explained: thus the entry "Entail, 65*, 76," shows that the legal definition of *entail* will be found at p. 65.

AGRICULTURAL Holdings Act, 142, 145, 147
Aids, 60*
Aryan household, 113

BACON on perpetuities, 115
—— on uses, 93
Bargain and sale, 100
Base fee, 108*
Book-land, 22*, 24, 34
Borough-English, 47*
Building leases, 151

Cestui que use, 90*, 94
Common lands, 5, 17, 20, 36
Common, rights of, their revived importance, 172
"Conventionary" tenants, 49
Conveyances, secret, 99
Conveyancing Act, 160
Copyholds, 38, 43, 48
—— enfranchisement of, 171
Customs, local, as between landlord and tenant, 144

DARTMOOR, preservation of, 178
De Donis (statute), 65
Deeds, shortening of, 160
Devise 124*
Discontinuance, 77*
Distress for rent, 139

EASEMENTS, 169*
Enrolments, statute of, 101
Entail, 65*, 76
Epping Forest case, 176
Escheat, 62*

FEE simple, 64*
Feoffment, 72*
Feudalism, 52 *sqq.*
Fine, 82
Fines and Recoveries, abolition of, 161
Fixtures, law of, 143
Folk-land, 20*, 32
Foreshore, rights of public on, 13
Forest (royal), 40*
Frankalmoign, 34*, 86

GAVELKIND, 57
Grant, conveyance of freehold in possession by, 159

HERIOTS, 43

IMPROVEMENTS by tenant, compensation for, 145, 148
Inclosure, 36
Inclosure Acts, 173
Inheritance, modern law of, 169

LÆN-LAND, 27*
Lammas lands, 6, 37*
Land-tax, 126
Lease and release, conveyance by, 101
Leaseholding, 135 *sqq.*
Leaseholds, 7
—— urban, 150

Leaseholds, proposal for compulsory enfranchisement of, 155
Leasehold tenure, peculiarities of, 137
Leases for lives, 136
Limitation Acts, 168
Livery of seisin, 72*
Lord and man, 28

MANOR, 10, 33, 41
Merton, statute of, 173
Mortgage, 127
—— equitable, 130
Mortmain, 86, 87

"NATIONALISATION" of land, 184

OPEN spaces, preservation of, 174

PARISH lands, 38
Perpetuities, 106
—— Bacon on, 115
—— the rule against, 117
Personal laws, 16
Powers in settlements, 111
Prescription Act, 168
Primogeniture, 55
—— relation of legal to customary, 170
Public, rights of, on open lands, 14

Quia Emptores (statute of), 67

"REAL actions," 73
Recovery, common, 78
Redemption, equity of, 129*
Registry of titles or assurances, 165, 167
Remainder, 77*, 122
Remoteness, dispositions void for, 121, 123
Rents, conversion from labour into money, 134
Rents in kind, 8

SEALS, use of, 72
Serfs, 45
Serjeanty, grand, 126
Settled Land Act, 182
Settlements, 9
—— Lord St. Leonards on, 179
—— strict, nature of, 106, 112
—— strict, disadvantages of, 180
—— opinion of Real Property Commissioners on, 162
Socage land, 27*, 61
—— military tenures, converted into, 125
Subinfeudation, 67
Symbols in land transfer, 70

TENURE, 12
—— military, 32, 53
—— military, abolition of, 125
—— servile, 45, 59
Tin-bounding, 49
Titles, investigation of, 164
—— registration of, 165
Trusts, 99 (and see Uses)

USES, 88, 91
—— shifting, 120
—— statute of, 2, 89, 95

VILLAGE greens, 39, 174
Villenage, 44
Vouchee, common, 81, 83

WARDSHIP, 61
Warranty, 78*
Will, freedom of giving land by, 126
Wills Act, 163
Wills of land, 91, 97

YEARLY tenancy, 136

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